

United States
Court of Appeals
for the Ninth Circuit.

STATE OF WASHINGTON, a Sovereign State, and SMITH
TROY, Attorney General of the State of Washington,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

STATE OF WASHINGTON, a Sovereign State, and SMITH
TROY, Attorney General of the State of Washington,
Appellees.

Transcript of Record

Appeals from the United States District Court,
Western District of Washington
Southern Division.

FILED

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TROY, Attorney General of the State of Washington,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Attorney General of the State of Washington.

HARRY L. PARR, ESQ.,

Assistant Attorney General,

Temple of Justice,

Olympia, Washington.

Attorneys for Plaintiffs.

J. CHARLES DENNIS, ESQ.

United States Attorney,

GUY A. B. DOVELL, ESQ.,

Assistant United States Attorney,

324 Federal Building,

Tacoma, Washington,

Attorneys for Defendant.

In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil Action No. 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of
the State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING LEAVE TO FILE
SECOND AMENDED COMPLAINT

This matter coming regularly on to be heard upon the Motion of the Plaintiff for leave to file a 2nd Amended complaint and the Plaintiff being represented by Smith Troy, Attorney General, and Harry L. Parr and Charles R. Nelson, Assistants Attorneys General of the State of Washington; and J. Charles Dennis, United States Attorney and Guy A. B. Dovell, Assistant United States Attorney, and the matter being properly presented to the Court and the Court being fully advised in the premises,

It Is Hereby Ordered that leave be, and leave is hereby, granted to file the 2nd Amended Complaint, in this cause.

Done in open court this 11th day of December,
A.D., 1950.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Approved as to form:

/s/ GUY A. B. DOVELL,
Assistant U. S Attorney.

[Endorsed]: Filed December 11, 1950.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Come now the plaintiffs and for cause of action
against the defendants allege:

I.

That the State of Washington is a sovereign state
and one of the states of the United States; that the
Department of Labor and Industries is an admin-
istrative agency of the State of Washington cre-
ated by an act of the State Legislature, whose duty
is the collection of the debts to be used exclusively
for the payment of compensation to injured work-
men who are injured in the course of their em-
ployment within the State of Washington; that
Smith Troy is the duly elected, qualified and acting
Attorney General of the State of Washington and
charged by law with the duty of collecting all

monies due or to become due the State of Washington or any of its administrative agencies.

II.

That this cause is brought to this court which, by virtue of Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S. 2177) and specifically under sections 401-422 of said act, same being entitled the Federal Tort Claims Act (28 U.S.C.A., section 931), has jurisdiction to try said cause, the jurisdiction of this court being founded upon said act of Congress last mentioned; that the army vehicle hereinafter referred to was one owned by the United States of America and operated by army personnel as the agent of the United States of America and under direct supervision of the Secretary of War.

III.

That under the laws of the State of Washington, there is no statute of limitations as against debts due the State of Washington, Department of Labor and Industries, in its sovereign capacity; that the State of Washington administers workmen's compensation in its sovereign capacity and when an injured workman elects to take from the State of Washington and assigns his claim to the state, no statute of limitations runs against such claim.

IV.

That on the 9th day of March, 1945, Eldon Parke was engaged in employment within the State of Washington covered by the Workmen's Compensa-

tion Act; that on said day Eldon Parke was working within the scope of his employment for his employer, the State of Washington (Washington State Patrol Division) proceeding south on Washington Street which is an arterial street in the City of Vancouver, County of Clark, State of Washington, enroute to the Washington Patrol Office on First and Washington Streets in said city and was traveling between fifteen (15) and twenty (20) miles per hour and in all respects complying with the law, when at the intersection of Washington Street and Tenth Street in the heart of the business and congested district of the City of Vancouver, a United States Army fire truck, operated by Clarence D. Nelson, Corporal, in the United States Army, traveling on the left hand side of Tenth Street, and in utter disregard for the safety of all persons using the public highway, passed through the stop sign at Tenth and Washington Streets, at an unreasonable speed of from thirty (30) to forty-five (45) miles per hour, although such truck was not on an emergency trip to a fire but was proceeding to its usual and customary station at the City of Vancouver fire department's station to act as a stand-by truck, when said fire truck struck the car being operated by the said Eldon Parke, he, the said Eldon Parke being at that time more than half way across the intersection of Tenth and Washington Streets, said fire truck striking Eldon Parke's car in the rear end and spinning said car completely around and throwing said car off the highway and throwing the said Eldon Parke out of

the car and into a used car lot some twenty (20) feet distant; the said driver of the fire truck not looking where he was going and not stopping to offer aid nor assistance but continuing in his reckless manner on his journey, and all without fault on the part of Eldon Parke and thereby injuring the said Eldon Parke by causing multiple contusions and abrasions and a double fracture of the right femur and by reason of said injury the Department of Labor and Industries of the State of Washington paid out of the accident and medical aid funds for said injury of the said Eldon Parke the sum of \$3,671.56 which was a reasonable, proper and legal amount and sum to be paid for this injury. The said sum as aforesaid was in the sum of \$1,638.96 to the Northern Permenente Foundation, (Northern Permente Hospital) for medical attention and hospitalization of Eldon Parke and which sum was a reasonable, necessary and legal sum; and \$1,090.35 time loss to Eldon Parke for his time away from his duties which is a legal, necessary and reasonable sum; and permanent partial disability of \$685.00 paid to Eldon Parke which is a reasonable, necessary and legal sum; and \$15.00 to Dr. Kimberly; \$158.75 to Dr. Lucas; and \$83.50 for ambulance and traveling expenses of Eldon Parke, all of which sums are legal, reasonable and necessary for the care of Eldon Parke and all of which does not exceed but equals the sum of \$3,671.56.

V.

That said accident was a third party accident

and under the laws of the State of Washington a workman has the election either to sue the negligent party or to take from the Accident and Medical Aid Funds of the Department of Labor and Industries; said Eldon Parke elected in writing to take from the Department of Labor and Industries and from the Accident and Medical Aid Funds and thereupon assigned in writing his claim to the Department of Labor and Industries of the State of Washington and the Accident and Medical Aid Funds thereof.

VI.

That the Congress of the United States enacted Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S. 2177) wherein and whereby under section 131 of said law the Congress banned all private bills, but in said law provided that suit for the same may be instituted under the Federal Tort Claims Act and in accord with said law this suit and proceeding is brought; that under the laws of the State of Washington plaintiffs are entitled to recover in accord with the law of said state wherein the injury or negligence occurred and under said laws of the State of Washington recovery may be had in a third party accident but never to exceed the amount paid by the Department of Labor and Industries, to wit: in this cause, \$3,671.56.

VII.

That heretofore and prior to the passage of Public Law 601, the War Department had a rule and regulation refusing payment of all subrogations

and immediately after the passage of Public Law 601, the War Department changed its rules and regulations in accordance with Public Law 601 and now under its rules and regulations the rights of subrogees are determined in accordance with the laws of the place where the act or omission occurred out of which the claim arises.

Wherefore, plaintiffs pray for a judgment against the defendants in a sum not exceeding \$3,671.56 without interest and for plaintiff's costs herein.

SMITH TROY,
Attorney General.

.....

Harry L. Parr,
Assistant Attorney
General.

.....

Charles R. Nelson,
Assistant Attorney
General.

United States of America,
State of Washington—ss.

George H. Holt, Chief Assistant Attorney General, being first duly sworn on oath deposes and says: That he is the Chief Assistant Attorney General with powers to verify the Complaint in the absence of the Attorney General; that the Attorney General is now absent from the City of Olympia;

that affiant has read the above and foregoing 2nd amended complaint and knows the contents thereof and that he makes this verification for and on behalf of the State of Washington.

/s/ GEORGE H. HOLT,
Chief Assistant Attorney
General.

Subscribed and sworn to before me this 6th day of December, 1950.

[Seal] /s/ JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington, residing at Olympia, Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed December 11, 1950.

[Title of District Court and Cause.]

AMENDED ANSWER
AND CROSS-COMPLAINT

Comes now the defendant and for answer to plaintiffs' second amended complaint, denies and alleges as follows:

First Defense

That plaintiffs' second amended complaint fails to state a claim against this defendant upon which the relief prayed for can be granted.

Second Defense

I.

That defendant denies each and every allegation of plaintiffs' second amended complaint save and except what is hereinafter expressly admitted.

II.

That defendant admits paragraphs numbered I and II of plaintiffs' second amended complaint.

III.

Answering paragraphs III, V, VI and VII of plaintiffs' second amended complaint, this defendant admits that the Congress of the United States enacted Public Law 601, 79th Congress, Chapter 753, Second Session (S. 2177), which permitted institution of suits under said act, designated as the Federal Tort Claims Act as alleged in paragraph VI of plaintiffs' second amended complaint, but as to all other alleged facts set forth in said paragraph this defendant alleges that it has no information or belief sufficient to enable it to answer the allegations therein contained, and for lack of such information and belief and basing its answer upon that ground, denies generally and specifically each and every other statement of alleged facts in said paragraphs contained.

IV.

Answering paragraph IV of plaintiffs' second amended complaint, the defendant admits that at the time and place mentioned therein that the Gov-

ernment's vehicle therein described was being operated by its employee, Corporal Clarence B. Nelson, of Vancouver Barracks, Washington, and that plaintiffs' vehicle, a Washington State Patrol car, was being operated by one Eldon J. Parke, a member of the Washington State Patrol, and that a collision of said vehicles then and there occurred, but denies that the defendant was negligent or that defendant driver was operating said Government vehicle in a careless, reckless, negligent or unlawful manner or at an excessive rate of speed for the time and place and under the circumstances then and there existing, and in that connection defendant states that if plaintiffs' driver, Eldon J. Parke, sustained any damage by reason of said accident to himself as therein alleged, that such accident and resulting damage, if any, were not proximately caused by any alleged act of negligence on the part of the defendant or defendant's driver, but was the direct and proximate result of plaintiffs' driver's own negligence and failure to exercise due care and caution, and yield the right-of-way to the Government's fire truck, which was an authorized emergency vehicle as defined by Sec. 6312-1(a) of Rem. Rev. Stats. of Washington, and was being operated in accordance with Sec. 6360-93, by a person approved as an operator in accordance with Sec. 6360-132 thereof; and that upon information and belief defendant denies that plaintiffs' driver suffered any injuries as alleged in plaintiffs' second amended complaint, and further thereupon denies that the Department of Labor and Industries paid

out of its funds for such alleged injury the sum of \$3,671.56, or any other sum whatsoever, and denies that such sum was a reasonable, proper, and legal amount and sum to pay to said Eldon J. Parke for such alleged injury.

Affirmative Defenses

Further answering said second amended complaint, and as a first affirmative defense, the defendant alleges as follows:

I.

That at the time in question, the plaintiffs were guilty of negligence which materially and proximately contributed to cause said accident and plaintiffs' alleged damages, if any; and which negligence consisted of the unlawful acts and omissions of plaintiffs' employee, the driver of said patrol car, in the following particulars:

1. In failing to yield the right-of-way to defendant's fire truck, an authorized emergency vehicle, which was then and there proceeding on an emergency mission.

2. In entering the intersection where the accident occurred without heeding the fire siren when he heard it, or in the exercise of reasonable care and attention as he approached the intersection, he would have heard the fire siren and, under the circumstances should have brought his vehicle to a stop in time to avoid said accident.

3. In failing to exercise and use such ordinary caution and care as a reasonably prudent and care-

ful person would have exercised under similar circumstances.

For further answer and for second affirmative defense, defendant alleges as follows:

I.

That heretofore and on the 20th day of May, 1948, in cause No. 1083 then pending in this court between the parties to the above-entitled action and for the same cause of action as that set forth in the second amended complaint, judgment of dismissal without costs and without prejudice was entered herein.

II.

That thereafter, and on the 17th day of January, 1949, in cause No. 1137 then pending in this court between the State of Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, plaintiffs, and United States of America, defendant, and for the same cause of action as that set forth in said second amended complaint, pursuant to motion to dismiss of the defendant and upon stipulation of the parties, judgment of dismissal without costs was entered, and that said judgment in said cause No. 1137 is final and conclusive upon the identical issues and cause of action stated in plaintiffs' second amended complaint in this action and has accordingly become res adjudicata of the matters and things alleged in plaintiffs' second amended complaint.

For further answer and for a third affirmative defense, the defendant alleges as follows:

I.

That the cause of action stated in plaintiffs' second amended complaint was not brought within the time provided by statute.

Cross-Complaint

The defendant, United States of America, by way of counter-claim and cross-complaint, complains against the plaintiff herein, the State of Washington, a sovereign state, and alleges as follows:

I.

That the defendant and cross-complainant, United States of America, is a sovereign entity.

II.

That the State of Washington is a sovereign state and one of the States of the United States, and the State vehicle, hereinafter referred to was owned by the State of Washington and operated by a State patrolman as the agent and employee of the State of Washington, and under direct supervision of the Washington State Patrol.

III.

That on or about 4:00 o'clock p.m., on March 9, 1945, a Government fire truck, which was an authorized emergency vehicle, operated by an approved operator as defined by State law, and which was being duly dispatched from the Post Fire Sta-

tion, Vancouver Barracks, Washington, to report to the City of Vancouver Fire Department, and being driven by Corporal Clarence B. Nelson, was proceeding west along 10th Street at the speed of approximately 30 miles per hour; that as said Government vehicle approached the intersection of 10th and Washington Streets in the City of Vancouver, Washington, the Government driver reduced the speed of said vehicle to approximately 25 miles per hour, at which time the red light on the front left fender was lit, and the fire siren was being sounded; that as the Government fire truck proceeded to cross and had reached the center of said intersection, the State Patrol car operated by Patrolman Eldon J. Parke, which had been proceeding along the inner lane of southbound traffic on Washington Street, entered the intersection and crossed directly in the path of the oncoming Government fire truck, causing the fire truck to strike the rear left of the State patrol car, the impact of which threw the said patrolman out of the vehicle in the manner more particularly hereinafter set forth.

IV.

That by reason of the premises it became necessary for the cross-complainant in repairing its vehicle damaged as aforesaid and in replacing parts thereof damaged, beyond repair, to expend for parts and labor the sum of \$60.76, all of which were necessary and reasonable to the damage of cross-complainant in the said sum of \$60.76, the same consisting of the following-described items, to wit:

1. Labor:

Repair front grill, 15 hours at \$1.27 \$19.05

Straighten and repair frame, 10 hours

at \$1.27 12.70

Repair left front fender, 8 hours at \$1.27 10.16

Total cost of labor \$41.91

2. Parts:

New Bumper \$18.50

Miscellaneous35

Total cost of parts \$18.85

Total cost of repairs \$60.76

V.

That the sole and proximate cause of the accident and resulting damage was the negligence on the part of the driver of the State patrol car, which consisted of the following particulars:

(1) In failing to yield the right-of-way to defendant's fire truck, an authorized emergency vehicle, which was then and there at time of accident proceeding on an emergency mission.

(2) In entering the intersection where the accident occurred without heeding the fire siren when he heard, or in the exercise of reasonable care and attention as he approached the intersection, he would have heard the fire siren, and under the circumstances, should have brought his vehicle to a stop in time to avoid said accident.

(3) In failing to exercise and use such ordinary

caution and care as a reasonably prudent and careful person would have exercised under similar circumstances.

Wherefore, this defendant and cross-complainant prays that the plaintiffs take nothing by their action, and that the same be dismissed, and that the United States of America, cross-complainant herein, have and recover judgment against the plaintiff, State of Washington, in the sum of \$60.76, together with its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Asst. United States Attorney.

Affidavit of Mailing attached.

[Endorsed]: Filed December 15, 1950.

[Title of District Court and Cause.]

REPLY TO AMENDED ANSWER AND CROSS
COMPLAINT

Come now the plaintiffs and for reply to the amended answer and cross complaint of the defendant say:

I.

Deny each and every allegation and the whole thereof of that portion of the amended answer and cross complaint designated First Defense.

II.

Plaintiffs deny that portion of Paragraph III of the Second Defense that Eldon J. Parke was guilty of any act of negligence and any failure to exercise due care and caution and yield the right of way to the government's fire truck and deny that said fire truck at said time was an emergency vehicle or that the driver was an approved operator.

III.

Plaintiffs deny Paragraph I of defendant's amended answer and cross complaint designated as Affirmative Defenses and deny each and every allegation and the whole thereof in paragraph marked I, 1, 2 and 3.

IV.

Plaintiffs deny that portion designated for a further answer and second affirmative defense and numbered I, and II, asserting that said cause was dismissed not on the merits but because the Attorney General of the United States was not served and for no other reason and that the same is in res adjudicata.

V.

Plaintiffs deny that portion of Paragraph III of the cross complaint which alleges that the government fire truck was an authorized emergency vehicle operated by an approved operator as defined by state law and deny that Eldon J. Parke entered the intersection and crossed directly in the path of the oncoming government fire truck.

VI.

Plaintiffs deny each and every allegation and the whole thereof of Paragraphs IV and V of defendant's cross complaint.

Wherefore plaintiffs pray as heretofore in their second amended complaint.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

State of Washington,
County of Thurston—ss.

George H. Holt, being first duly sworn on oath says: That he is Chief Assistant Attorney General of the State of Washington and is empowered in the absence of the Attorney General to make this verification; that he has read the above and foregoing Reply and knows the contents thereof and believes the same to be true and that he makes the same for the State of Washington.

/s/ GEORGE H. HOLT.

Subscribed and sworn to before me this 18th day of December, 1950.

/s/ ERWIN E. DAVENPORT,
Notary Public in and for the State of Washington
residing at Olympia.

[Endorsed]: Filed December 18, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause, coming on regularly for trial on the 18th and 19th day of December, 1950, before the undersigned judge of the above-entitled court, sitting without a jury, plaintiffs appearing by their attorneys, Smith Troy, Attorney General of the State of Washington, and Harry L. Parr and Charles R. Nelson, Assistant Attorneys General, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington and Guy A. B. Dovell, Assistant United States Attorney for said district, and the court having heard and considered the arguments of defendant's counsel, upon the legal issues presented by the First Defense and Second and Third Affirmative Defenses contained in defendant's Amended Answer and Cross-Complaint, and overruled the same, and thereupon proceeded to trial, evidence both oral and documentary having been introduced; brief having been submitted and oral argument having been made by counsel for plaintiffs; and the court thereupon being fully advised in the premises, and having announced its decision orally, does hereby make the following:

Findings of Fact

I.

That in the above-entitled cause the State of

Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, as plaintiffs herein seek to recover from the defendant, United States of America, on a claim in the sum of \$3,671.56 assigned by one Eldon J. Parke, a state employee, to the State of Washington, for and on account of moneys paid to him or in his behalf in said amount out of the accident and medical aid funds of said state for personal injuries resulting from the collision between a patrol car owned by the State of Washington, and driven by Eldon J. Parke, and a government fire truck owned by the defendant and driven by Clarence B. Nelson, a government employee, which occurred on March 9, 1945, at the intersection of 10th and Washington Streets in the city of Vancouver, State of Washington.

That the claim and cross-claim herein arise under the Act of August 2, 1946, known as the Federal Tort Claims Act, (28 U.S.C.A. 931 et seq.; New Title 28, U.S. Code, Sections 1346 and 1402).

II.

That at the time of said accident and for a number of years prior thereto there had existed a verbal understanding and agreement between the civilian fire department of the City of Vancouver, and the U.S. Fire Department at Vancouver Barracks whereby mutual and reciprocal assistance was rendered to each other in time of need.

That the designated route at said time for travel by the government fire truck when answering a call

from the city for a standby truck was west from the Barracks along 10th Street, and across Washington Street to the city fire station located on 8th Street between Columbia and Washington Streets in the City of Vancouver.

III.

That at or about 4:00 o'clock p.m. on March 9, 1945, a government fire truck, which was an authorized emergency vehicle, operated by an approved operator as defined by state law, and which was being duly dispatched from the government fire station, Vancouver Barracks, pursuant to call received at the Post Fire Station from the city fire department for a government fire truck to stand by at the city fire station while the civilian fire department attended a fire call, and being driven by Corporal Clarence B. Nelson, one of the enlisted men on duty at the Post Fire Station, in response to said call, and accompanied by two other enlisted fire fighters, Pfc. Baldermar Valdez in the front seat, and Pfc. Hobart C. Cornell on the rear step, was proceeding West along 10th Street at a speed of approximately 30 miles per hour with the red light on the front left fender lit and the fire siren being sounded all the time; that as the fire truck reached the intersection of 10th and Washington Streets, Washington Street being a duly designated and marked arterial street pursuant to law, the speed thereof was reduced to approximately 25 miles per hour, and the fire truck, with its siren still sounding, and red light showing entered said intersection,

without stopping at the "stop" sign at said intersection and had reached the center thereof when it struck the state patrol car operated by Patrolman Eldon J. Parke, and which had been proceeding along the inner lane of southbound traffic on Washington Street, and he, failing to hear the fire siren in time, did not give way to the oncoming government fire truck, the fire truck striking the rear left of the state patrol car and the impact knocking the patrol car some 20 feet, throwing said patrolman out of the car and injuring him to the extent of the amount hereinbefore claimed, and damaging the fire truck in the sum of \$60.76, the amount expended for repairs on account thereof.

IV.

That neither of the drivers was exceeding the speed limit and both vehicles were emergency vehicles; that the state patrol car was enroute to Washington Patrol Office on First and Washington Streets, and not on an emergency call, and the issue herein resolves itself to whether in answering a call to the city fire station to report as a standby truck it can be said that the government fire truck was on an emergency call or not.

The government fire truck carried two fire fighters in addition to the driver, and with the city fire truck out it was extremely important that the government fire truck reached its destination as soon as possible. The Army had given orders that as soon as the fire truck reached 10th Street it should sound its siren and flash the red light, and the

siren was being sounded, accordingly. Under the facts as they existed and were so recognized by the Army and the City of Vancouver, it is clear that this trip was in fact an emergency trip, and that the government fire truck had the right of way enroute to the city fire station. The route established by Army order included crossing the intersection at 10th and Washington Streets, and it follows therefrom that the proximate cause of the accident was the failure of the driver of the state patrol car to yield the right of way to the defendant's fire truck, an authorized emergency vehicle, which was then and there at the time of the accident proceeding on an emergency mission.

See *Puget Sound Electric Ry. v. Benson*,
253 Fed. 710.

V.

That the defendant has not established by preponderance of evidence that the driver of the state patrol car heard, or in the exercise of reasonable care and attention as he approached the intersection would have heard the fire siren, and under the circumstances could have or should have brought his vehicle to a stop in time to avoid said accident, and for such reason recovery to the defendant in its cross-claim must also be denied.

Done in Open Court this 9th day of January,
1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

From the foregoing Findings of Fact, the court now concludes:

I.

That the court has jurisdiction of the subject matter of this action and cross-action and of the parties hereto.

II.

That the plaintiffs are not entitled to recover judgment on their action, and the defendant is not entitled to recover judgment on its cross-action; and the plaintiffs' action, and the defendant's cross-action should therefore each be denied and dismissed, and that the defendant is entitled to judgment for costs and judgment should be entered in accordance herewith.

Each of the parties, by counsel, has excepted to each and every adverse finding of fact and conclusion of law of the court hereinabove set forth and the defendant by counsel further excepts to the adverse rulings on its legal defenses set up in its amended answer, and each of said exceptions is hereby allowed.

Done in Open Court this 9th day of January, 1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

SMITH TROY,
Attorney General.

HARRY L. PARR,
Assistant Attorney General.

C. R. NELSON,
Assistant Attorney General.

Receipt of copy acknowledged.

Lodged January 4, 1951.

[Endorsed]: Filed January 9, 1951.

United States District Court, Western District of
Washington, Southern Division

No. 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of
the State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly to be heard before the court on the 18th and 19th days of December, 1950; the plaintiffs appearing by their attorneys, Smith Troy, Attorney General of the State

of Washington, and Harry L. Parr and Charles R. Nelson, Assistant Attorneys General, and the defendant, United States of America, appearing by its attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, and the court having heard the testimony of witnesses and received and considered the documentary evidence introduced herein, and heard the argument of counsel, and having heretofore on this day made and entered its Findings of Fact and Conclusions of Law wherefrom it appears that neither the plaintiffs on their claim are, nor the defendant on its claim is, entitled to recover thereon, and that the same should be dismissed, and that the defendant is entitled to judgment for costs, and the court being fully advised in the premises, it is now, therefore,

Ordered, Adjudged and Decreed that neither the plaintiffs on their action nor the defendant on its cross-action shall recover judgment, and the plaintiffs action, and the defendant's cross-action be, and the same are hereby denied and dismissed; and it is further,

Ordered, Adjudged and Decreed that the defendant, United States of America, do have and recover judgment against the plaintiffs for its costs herein incurred, amounting to the sum of \$61.28.

Each of the parties, by counsel, has excepted to each and every adverse ruling of the court hereinabove set forth, and said exception is hereby allowed.

Done in Open Court this 9th day of January,
1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Lodged December 28, 1950.

Judgment entered in Civil Docket 7, January 9,
1951.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

DISBURSEMENTS

	Amt. Claimed	Amt. Allowed
Clerk's Fees	\$15.00	Paid
Marshal's Fees50	\$ 0.50
Attorney's Fees	20.00	20.00
Commissioner's Fees
Master in Chancery's Fees
Reporter's Fees
Witness:		
Clarence B. Nelson, 1848 St. Helens Avenue, Vancouver, Washington	25.78	25.78
Total.....	\$61.28	\$46.28

Taxed January 9, 1951.

/s/ E. E. REDMAYNE,
Deputy Clerk.

United States of America,
Western District of Washington—ss.

Guy A. B. Dovell, being duly sworn, deposes and says: That he is the attorney for the defendant in the above-entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

/s/ GUY A. B. DOVELL.

Subscribed and sworn to before me, this 9th day of January, 1951.

[Seal] /s/ WILLIAM C. ROFF,
Deputy Clerk, U. S. District Court, Western District of Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed January 9, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the State of Washington and Smith Troy, Attorney General of the State of Washington, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the

final judgment denying the plaintiffs the relief prayed for, which was entered in this action on the 9th day of January, 1951.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

State of Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, appellants herein, and Lumbermen's Mutual Casualty Company, surety, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their successors and assigns, to make good all taxable costs and charges, not exceeding the sum of \$250.00, that the appellees may be put to or allowed if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified.

The said surety hereby irrevocably appoints the clerk of this court as its agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed, and delivered this 7th day of March, 1951.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ [Indistinguishable.]
Lumbermen's Mutual
Casualty Company.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on January 9, 1951, which denies to the defendant recovery from the plaintiff upon its cross-action.

Dated this 8th day of March, 1951.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant and Cross - Complainant, United
States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1951.

[Title of District Court and Cause.]

STIPULATION DESIGNATING PARTS OF
RECORD TO BE OMITTED FROM THE
RECORD ON APPEAL

Pursuant to Rule 75(o) of the Federal Rules of Civil Procedure for the District Courts of the United States, and the provision for hearing of appeals on original papers by Rule 11 of the United States Court of Appeals for the Ninth Circuit, effective January 1, 1949; it is hereby,

Stipulated, Agreed and Understood by and between Smith Troy, Attorney General of the State of Washington, and Harry L. Parr and C. R. Nelson, Assistant Attorneys General of the State of Washington, attorneys of record herein for plaintiffs, and J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, attorneys of record herein for defendant, that all the original papers of record in the above-entitled court and cause, with the exception of the following named, to wit:

1. Order granting leave to file Second Amended Complaint.
2. Second Amended Complaint.
3. Amended Answer and Cross-Complaint.
4. Reply to Amended Answer and Cross-Complaint.
5. Findings of Fact and Conclusions of Law.
6. Judgment.

7. Cost Bill.
8. Plaintiff's Exhibits Nos. 1, 2 and 3.
9. Defendant's Exhibit A-1.
10. Stipulation admitting Defendant's Exhibit A-1 into the Record.
11. Reporter's transcript of all proceedings and evidence had in this Cause.
12. Notice of Appeal (Plaintiffs').
13. Appeal Bond with Power of Attorney attached.
14. Notice of Appeal (Defendant's).
15. This Stipulation covering record on Appeal.
16. Statement of Points (Plaintiffs').
17. Statement of Points (Defendant's).

Are to be omitted from the record on appeal.

Dated this 22nd day of March, 1951.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

J. CHARLES DENNIS,
U. S. Attorney, Western
District of Wash.

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney, Western District of
Washington.

[Endorsed]: Filed March 22, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a Statement of Points on which appellants, State of Washington, a sovereign state, and Smith Troy, as Attorney General of the State of Washington, intend to rely on Appeal:

I.

That the District Court erred in finding and concluding that the City of Vancouver, Washington, recognized the trip of the Army fire truck, from Vancouver barracks to the City fire station, to act as a standby vehicle, as an emergency trip.

II.

That the District Court erred in finding and concluding that the Army fire truck, in answering a call to the City fire station to report as a standby truck, was on an emergency call.

III.

That the District Court erred in finding and concluding that the proximate cause of the accident was the failure of the driver of the State Patrol car, an emergency vehicle, to yield the right of way to the Army fire truck, an emergency vehicle.

IV.

That the District Court erred in holding that the Plaintiffs' were not entitled to recover judgment on their action, and in denying and dismissing Plaintiffs' action, in that such dismissal is contrary to

evidence, and contrary to the law governing the case; in awarding Defendant judgment for costs.

SMITH TROY,
Attorney General.

/s/ HARRY L. PARR,
Assistant Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1951.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled action by their respective attorneys and subject to the approval of the Court as follows:

That the certified copies of the following named pleadings in Civil Cause No. 1137, records of this Court, attached hereto and marked "Defendant's Exhibit A-1," to wit:

1. Complaint.
2. Defendant's Motion to Dismiss.
3. Stipulation and Order of Dismissal.

may now be filed as an exhibit in the above-entitled action and may be considered as evidence by the court as though the same had been admitted in the evidence at the time of trial.

It Is Further Stipulated by said parties that this stipulation and attached exhibit, with approval of the Court, shall be filed with the Clerk of said Court as a part of the record on appeal in the above-entitled cause and included in the stipulation designating parts of the record, proceedings and evidence to be included with the record on appeal.

Dated this 15th day of March, 1951.

SMITH TROY,
Attorney General,

By /s/ C. R. NELSON,
Asst. Atty. Gen.,
Attorneys for Plaintiff.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for
Defendant.

Approved:

/s/ CHARLES H. LEAVY,
United States District Judge.

DEFENDANT'S EXHIBIT A-1

In the District Court of the United States for the
Western District of Washington, Southern Division

No. 1137

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiffs and for cause of action
against the defendants allege:

I.

That the State of Washington is a sovereign state
and one of the states of the United States; that the
Department of Labor and Industries is an adminis-
trative agency of the State of Washington created
by an act of the state legislature, whose duty is
collection of the debts to be used exclusively for the
payment of compensation to injured workmen who
are injured in the course of their employment
within the State of Washington; that Smith Troy
is the duly elected, qualified and acting attorney
general of the State of Washington and charged by
law with the duty of collecting all monies due or to

become due the State of Washington or any of its administrative agencies.

II.

That this cause is brought to this court which, by virtue of Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S.2177) and specifically under sections 401-422 of said act, same being entitled the Federal Tort Claims Act (28 U.S.C.A., section 931), has jurisdiction to try said cause, the jurisdiction of this court being founded upon said act of Congress last mentioned; that the army vehicle hereinafter referred to was owned by the United States of America and operated by army personnel as the agent of the United States of America and under direct supervision of the Secretary of War.

III.

That under the laws of the State of Washington, there is no statute of limitations as against debts due the State of Washington, Department of Labor and Industries, in its sovereign capacity; that the State of Washington administers workmen's compensation in its sovereign capacity and when an injured workman elects to take from the State of Washington and assigns his claim to the state, no statute of limitations runs against such claim.

IV.

That on the 9th day of March, 1945, Eldon Parke was engaged in employment within the State of Washington covered by the Workmen's Compensation Act; that on said day, Eldon Parke was work-

ing for his employer, the State of Washington (Washington State Patrol Division) proceeding south on Washington Street in the City of Vancouver, County of Clark, State of Washington, enroute to the Washington Patrol office on First and Washington Streets, in said city, and was traveling between 15 and 20 miles per hour and in all respects complying with the law, when a United States Army fire truck operated by Clarence B. Nelson, a corporal in the United States Army, traveling at a speed of 50 miles per hour, same being an excessive rate of speed for the time and place, struck the car being operated by the said Eldon Parke, all without fault on the part of the said Eldon Parke and thereby injuring the said Eldon Parke by causing multiple contusions and abrasions and double fracture of the right femur and by reason of said injury the Department of Labor and Industries paid out of the Accident and Medical Aids Funds for the injury of the said Eldon Parke the sum of \$3,651.56, which was a reasonable, proper and legal amount and sum to pay to the said Eldon Parke for his injury.

V.

That said accident was a third party accident and under the laws of the State of Washington a workman has the election either to sue the negligent party or to take from the Accident and Medical Aid Funds of the Department of Labor and Industries; said Eldon Parke elected in writing to take from the Department of Labor and Industries and from

the Accident and Medical Aid Funds and thereupon assigned in writing his claim to the Department of Labor and Industries of the State of Washington and the Accident and Medical Aid Funds thereof.

VI.

That the Congress of the United States enacted Public Law 601, 79th Congress, Chapter 753, 2nd Sess. (S.2177) wherein and whereby under section 131 of said law the Congress banned all private bills but in said law provided that suit for same may be instituted under the Federal Tort Claims Act and in accord with said law this suit and proceeding is brought; that under the laws of the State of Washington plaintiffs are entitled to recover in accord with the law of said state wherein the injury or negligence occurred and under said laws of the State of Washington recovery may be had in a third party accident but never to exceed the amount paid by the Department of Labor and Industries, to wit, in this cause, three thousand six hundred fifty-one and 56/100 dollars (\$3,651.56).

VII.

That heretofore and prior to the passage of Public Law 601, the War Department had a rule and regulation refusing payment of all subrogations and immediately after the passage of Public Law 601, the War Department changed its rules and regulations in accordance with Public Law 601 and now under its rules and regulations the rights of subrogees are determined in accordance with the laws of

the place where the act or omission occurred out of which the claim arises.

Wherefore, plaintiffs pray for a judgment against the defendants in a sum not exceeding three thousand six hundred fifty-one and 56/100 dollars (\$3,651.56) without interest or principal and for plaintiffs' costs herein.

SMITH TROY,

Attorney General,

/s/ RUDOLPH NACCARATO,

Assistant Attorney General.

United States of America,
State of Washington—ss.

Smith Troy, being first duly sworn on oath, deposes and says: That he is the regularly elected, acting and qualified Attorney General of the State of Washington; that he has read the above and foregoing complaint and knows the contents thereof and that he makes this verification for and on behalf of the State of Washington.

/s/ SMITH TROY.

Subscribed and sworn to before me this 4th day of June, 1948.

[Seal] /s/ JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington
residing at Olympia.

Certified true copy.

[Endorsed]: Filed June 4, 1948.

United States District Court for the Western
District of Washington, Southern Division

No. 1137

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MOTION TO DISMISS

Comes now the United States of America, defendant above-named, and moves to dismiss this action for the reason and upon the grounds as follows:

I.

That the cause of action stated in the complaint of the plaintiff herein accrued on March 9th, 1945, and suit was not filed within one year after August 2, 1946, as required by Section 420 of the Federal Tort Claims Act, and this suit is barred by the statute of Limitations. (Title 28, U.S.C.A. Sec. 942)

II.

That the assertion of the claim herein is also

barred by the Anti-Assignment Statute. (Title 31 U.S.C.A. Section 203)

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, for Defendant.
Office & Post Office Address 324 Federal Bldg.,
Tacoma, 2, Wash.

Certified true copy.

[Endorsed]: Filed July 21, 1948.

United States District Court, Western District
of Washington, Southern Division

No. 1137

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION AND ORDER
OF DISMISSAL

STIPULATION

Pursuant to defendants' motion to dismiss on

grounds that the above-entitled suit is barred by the Statute of Limitations,

It Is Hereby Stipulated and Agreed that the above-entitled action be discontinued without cost to either party as against the other, and that an order to that effect may be entered by either party without notice.

Dated this 10th day of January, 1949.

/s/ SMITH TROY,

Attorney General of the
State of Washington.

/s/ RUDOLPH NACCARATO,

Assistant Attorney General.

/s/ J. CHARLES DENNIS,

United States Attorney,

/s/ GUY A. B. DOVELL,

Asst. United States Attorney.

ORDER OF DISMISSAL

Pursuant to the foregoing stipulation, and the Court being fully advised in the premises, it is now, therefore,

.Ordered, Adjudged and Decreed that the above-entitled cause be and the same is hereby dismissed without costs to either party as against the other.

Done In Open Court this 17th day of January, 1949.

/s/ CHARLES H. LEAVY,

United States District Judge.

Approved and Notice of Entry waived:

/s/ RUDOLPH NACCARATO,
Of Counsel for Plaintiff.

Presented by:

/s/ GUY A. B. DOVELL,
Asst. United States Attorney.

Certified true copy.

[Endorsed]: Filed January 17, 1949.

[Endorsed]: Filed March 15, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following is a statement of points on which defendant United States of America, appellee and cross-appellant, intends to rely on appeal.

I.

That the United States is entitled to recover the amount of its damages claimed in its cross-action.

II.

That the District Court erred in concluding that the United States was not entitled to recover judgment on its cross-action, and in refusing to grant judgment thereon in the amount of \$60.76, the amount of damages found by the court.

III.

That the plaintiffs, appellants and cross-appellees

herein, are not entitled to recover on their cause of action herein for each and all of the following and separate reasons, namely:

1. That defendant's fire truck was an emergency vehicle, as defined by law, on an emergency call and was entitled to the right of way, and the failure and neglect of plaintiffs' vehicle to yield the right of way was the proximate cause of the accident.

2. That regardless of the nature of the call being answered by defendant's fire truck, plaintiffs' driver was guilty of contributory negligence when he heard the siren and failed to observe the fire truck and failed to do anything to avoid the accident.

3. That the cause of action set up by plaintiffs in their present action was heretofore dismissed in a prior action between the same parties, and pursuant to Rule 41(b) of Federal Rules of Civil Procedure, such dismissal, not otherwise specified in the order, operated as an adjudication upon the merits, and the matters alleged in the complaint are and have become *res adjudicata*.

Dated this 19th day of March, 1951.

/s/ J. CHARLES DENNIS,

United States Attorney,

/s/ GUY A. B. DOVELL,

Assistant United States Attorney, Attorneys for
United States of America, Appellee and cross-
appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 22, 1951.

In the District Court of the United States for the
District of Washington, Southern Division

Civil Docket Number 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, Attorney General,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

Transcript of proceedings had in the above-entitled and numbered cause had in the above-entitled court before the Honorable Charles H. Leavy, United States District Judge, at Tacoma, Washington, commencing at 2:00 o'clock, p.m., on the 18th day of December, 1950.

Appearances:

HARRY L. PARR, ESQ.,
Assistant Attorney General, and

C. R. NELSON, ESQ.,
Assistant Attorney General,
Temple of Justice, Olympia, Washington,
Appeared for Plaintiffs; and

GUY A. B. DOVELL, ESQ.,
Assistant United States Attorney,
Federal Building, Tacoma, Washington,
For Defendant.

PROCEEDINGS

The Court: Docket 1326, State of Washington, et al., vs. United States, for trial to the Court Are the parties ready?

Mr. Parr: The Plaintiffs are ready, your Honor.

Mr. Dovell: The Government is ready, your Honor.

The Court: I have gone over these pleadings somewhat, and the amended Complaint has been responded to now by an Answer, and, among other things, there is a challenge to the jurisdiction of the Court to try this case because of the fact that the statute of limitations has run against it.

Is that correct, Mr. Dovell?

Mr. Dovell: Yes, your Honor.

The Court: And then there is, if the Plaintiffs can overcome that difficulty, this further matter; well, it is a defense on the facts, I guess: Failure to yield the right of way.

Mr. Dovell: There is the further defense of res adjudicata.

The Court: And that is based on the former order of dismissal herein, Mr. Dovell?

Mr. Dovell: In cause number 1137, in the second case.

The Court: Well, I think before we attempt to go into the merits of this we will have to make a disposition of these matters that are strictly matters of law, and the first one, perhaps, in order would be this question of res adjudicata, Mr. Dovell, and I [2*] want to hear from you on that.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Dovell: The order that was entered in the cause number 1137—that was the second action to be brought covering this claim, your Honor——

The Court: Yes.

Mr. Dovell: In that case the Defendant had made a motion to dismiss which stated:

“That the cause of action stated in the complaint of the plaintiff herein accrued on March 9, 1945, and suit was not filed within one year after August 2, 1946, as required by Section 420 of the Federal Tort Claims Act, and this suit is barred by the Statute of Limitations.”

But later, prior to having the case set down for hearing on that motion, the Attorney General, Smith Troy, and Rudolph Naccarato, Assistant Attorney General, entered into a stipulation with the United States Attorney and myself, in which stipulation it was stated that:

“Pursuant to defendant’s motion to dismiss on grounds that the above-entitled suit is barred by the Statute of Limitations, it is hereby stipulated and agreed that the above-entitled action be discontinued without cost to either party as against the [3] other, and that an order to that effect may be entered by either party without notice.”

And the Court entered the order on the 17th day of January, 1949, in which it was stated:

“Pursuant to the foregoing stipulation, and the Court being fully advised in the premises, it is now, therefore, Ordered, Adjudged and

Decreed that the above-entitled cause be and the same is hereby dismissed without costs to either party as against the other.”

The Court said nothing about prejudice.

Under Rule 41 of the Federal Rules of Civil Procedure—and this was pursuant to a motion to dismiss—the last sentence in paragraph (b) of Rule 41 states:

“Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.”

The Court: Read that again, Mr. Dovell.

Mr. Dovell: Yes.

“Unless the court in its order for [4] dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.”

Your Honor, where there has been an interpretation of that provision as to *res adjudicata*, it is—I cite the case of—*American National Bank and Trust Company of Chicago vs. United States*, in 142 Federal Second, page 571: This is a case in which action was brought on a war risk term insurance policy by the American National Bank and Trust Company of Chicago, conservator of an incompetent veteran’s estate, against the United

States of America. Judgment was for the Defendant and the Plaintiff appeals. It was affirmed. This was from the United States Court of Appeals for the District of Columbia, and it was decided May 8, 1944, and the Court said:

“Appellant had previously sued on the same policy in the United States District Court for the Northern District of Illinois. That suit was ‘dismissed for want of prosecution’ on January 31, 1940. The present suit was filed in the District of Columbia on January 27, 1941.

“Under Rule 41(a)(2) of the Federal Rules of Civil Procedure, 28 U. S. C. A. [5] following section 723c, dismissal of a suit at the plaintiff’s instance is ‘without prejudice’ unless otherwise specified in the order. But under Rule 41(b) a dismissal on defendant’s motion, and likewise a dismissal not provided for in the Rules, ‘operates as an adjudication upon the merits’ unless otherwise specified in the order. The court has inherent powers to dismiss, on its own motion, for want of prosecution. Such a dismissal is not provided for in the Rules, and therefore operates as an adjudication upon the merits.”

This particular motion he is referring to is the one that the Court observed as not mentioned in the Rules. That is what we would term our local rule 41.

“In an effort to show that the suit in Illinois was dismissed at the plaintiff’s instance, and also that the judge intended the dismissal to be without prejudice, appellant offers an affidavit

of its former attorney. The judgment of a court cannot be modified by extrinsic evidence. Moreover the affidavit does not assert what [6] appellant seeks to show. On the contrary, it says that the court disposed of the suit 'on his own motion.' It intimates that appellant asked and the court declined to have the order include the phrase 'for reasons not affecting the merits.' It says that the court offered to give a 'certificate that the case was not called for trial; that no proceedings were had as affecting the merits, and that it was not, in any event, considered on the merits.' The affidavit comes only to this; the judge was unwilling to draw the order of dismissal so that it might not conclude the merits, but willing to certify to the fact that he had not considered the merits. That fact is legally irrelevant. Even if the court had made the suggested certificate it would have been useless to appellant. Since (1) the dismissal was on the court's motion, (2) by Rule 41 (b) such a dismissal, unless otherwise specified in the order, operates as an adjudication upon the merits, and (3) the court did not otherwise specify in the order, the dismissal necessarily operated as [7] an adjudication upon the merits. If the affidavit is correct, this appears to have been what the court intended.

Appellant seeks to avoid *res adjudicata* by claiming a substantive right to sue, which the Rules of Civil Procedure should not be permitted to abridge. He bases this claim upon a

provision in the World War Veterans' Act that 'if suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has lapsed.' But this provision merely extends the period of limitations. It does not abrogate the principle of *res judicata*. The new action may be brought only 'if one lies.' "

This amended act extended the time one year after the effective date of the amendment. That we contend is applicable to any contention that the statute would be subject—that is, *res adjudicata* would be subject—to that statute. It eliminates the decision of the Court.

This case was a case in which the United States was also involved. [8]

The Court: I will hear from you, Mr. Parr.

Mr. Parr: If your Honor please, I am hard of hearing.

The Court: We are discussing only this issue of *res adjudicata*.

Mr. Parr: Yes. If the Court please, we take the position here, first, that I don't understand any motion could be made here that this Complaint is not timely filed. The Court will remember that when I asked for an amendment I recited number (c) in Rule 15, and the amendment always goes back to the time of the original Complaint. I based it on that. So that I won't spend much time on that.

Now, the reason that we are here now, if the Court please, is that the case that was dismissed without prejudice—I was not in it but I know about that case—that case was dismissed long before the one that the United States Attorney had dismissed. Your Honor never went into that case at any time. Now this case is timely because the Act passed by the Congress—

The Court: I would rather not discuss that. That deals with the statute of limitations. I would rather you confine your argument to whether that dismissal is *res adjudicata*.

Mr. Parr: That is the dismissal because of non-service on the United States Attorney. That is the reason for the dismissal.

Mr. Dovell: No, that was the first case.

The Court: No, the second case is that it was [9] practically a stipulated dismissal.

Mr. Dovell: I will supply counsel with a copy.

Mr. Parr: I should be glad to be supplied because that is not my understanding. My understanding is that the first case was served on the United States Attorney and the first case was dismissed without prejudice.

Now the second case, if the Court please—my understanding is and it can be corrected if I am wrong—is that the only reason for dismissing the second case—Mr. Naccarato's case—is that the Attorney General of the United States had not been served.

The Court: The second case?

Mr. Parr: That is my understanding. The only reason.

The Court: No. If you will examine the files, I think you will find to the contrary. I have only a remote recollection. I haven't examined the files. Do you have the files on the second case here?

Mr. Parr: That is the only matter before the Court?

The Court: At the moment, yes.

Mr. Parr: There is another question that the law was amended to bring us in if we haven't res adjudicata.

The Court: Well, we will discuss that a little later.

Mr. Parr: If the Court please, I am going to let Mr. Nelson finish this.

The Court: Very well. Now, Mr. Nelson? [10]

Mr. Nelson: Your Honor, I am not familiar with the file here. However, as I understand it, the cause that was dismissed by stipulation, which counsel maintains is res adjudicata, was dismissed for the reason that counsel for Plaintiff and Defendant agreed that it was not timely brought. Is that correct, counsel?

Mr. Dovell: Pursuant to my motion to dismiss on that ground.

Mr. Nelson: Pursuant to your motion to dismiss on that ground. I assume that the reason being that in the original Act the Congress provided a certain period in which tort claims against the Government could be filed, and I assume further that the action which counsel maintains was dismissed with preju-

dice was dismissed because counsel for both parties agreed that the action had not been brought within the statutory time permitted by the original act of the Congress.

I want to point out to the Court that the Act passed by Congress was enacted April 25, 1949, reads as follows:

“A tort claim against the United States shall be forever barred unless action is begun thereon within two years after such claim accrues * * *”

which is the reason that the first one was dismissed, “* * * or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding \$1,000, it is presented [11] in writing * * *”

and so on.

Your Honor, I want to point out to the Court that on April 5, 1949, this statute was amended.

The Court: I am quite familiar with that, but I want to stay with Mr. Dovell's argument that this dismissal on January 17, 1949, is *res adjudicata* of the case under the provisions of Rule 41(b), and I want to say, Mr. Dovell, I am a little inclined to doubt that unless 41(b) provides for involuntary dismissal.

Mr. Dovell: My motion—your Honor, if it was dismissed pursuant to my motion, it was certainly involuntary.

The Court: The files indicate it was dismissed in furtherance of a stipulation. Your motion preceded

the stipulation, but the stipulation was made. Just what motives actuated the making of the stipulation in addition to your motion, I don't know, but it was doubtless a persuasive one. But, nevertheless, the record indicates here that:

“Pursuant to Defendant's motion to dismiss on grounds that the above-entitled suit is barred by the Statute of Limitations, it is hereby stipulated and agreed that the above-entitled action be discontinued without cost to either party * * *”

Mr. Dovell: It operates as an adjudication on the merits and that will be found in the first part of the rule. [12]

The Court: Well, that isn't applicable here. In the first one—I haven't examined that file—the Plaintiffs moved for dismissal. In the second one the Defendant challenged the Plaintiffs' right of recovery on the ground that the claim was barred by the statute. Before that motion could be heard the parties stipulated for a dismissal. It could hardly be held that the Plaintiffs were the moving party in this second dismissal so as to bring them under the provisions of Rule 41(a)

Mr. Dovell: I mean if it was considered a voluntary dismissal.

The Court: It was considered. It is not a matter of consideration. It is a matter of the record itself; a dismissal on stipulation. The Plaintiffs became concerned relative to the statute of limitations and when challenged on that ground stipulated a dismissal. Later on they came to the conclusion that

they were in error in the interpretation of the Act of Congress, that had been just enacted shortly before, extending time to two years and they instituted the present action.

I am satisfied I shall have to rule against you on the ground of *res adjudicata*, Mr. Dovell.

Mr. Dovell: Exception.

The Court: And then you come to the question of whether this is timely or whether you challenge on the statute of limitations and I may save some time by indicating what I think you will have to show in order to convince the Court that your position is sound [13] so that I would have to follow it, and that is this: I am quoting now from the United States Code, Congressional Service, Volume 2, the 81st Congress, one by the way that is still in session and was when this amendment was enacted. And I take it that the statements made by the Committee reporting this bill out is the best evidence that we can have as to the intent of Congress at the time, and I don't know of any cases that can be found since this enactment that go into the matter. So, in many respects, it is a matter of first impression so far as I know in any Appellate Court. I want to read to you what the Committee said in reporting this amendment out. I am reading now.

"The reported bill would enlarge the period for filing to 2 years from the date of accrual of the cause of action * * *"

I might say here this cause of action accrued long before the two year period so that it is out on that phase of the law.

“* * * or 1 year from the effective date of the amendatory act, whichever occurs later. The bill would, therefore, revive all those otherwise expired claims accruing on or after January 1, 1945, which (1) have not been determined adversely by a Federal agency or a Federal court, or (2) have been rejected by a Federal agency or a Federal court solely because of the statutory bar.” [14]

That is as far as I feel it is necessary to quote that. There is some further language, but the report of the Congressional Committee that accompanied this bill, and upon which it was enacted, seems to me to clearly indicate that whatever happened to the claim of the State of Washington against the United States, it was revised when Congress elected to extend the statute of limitations.

What do you have to say to that, Mr. Dovell?

Mr. Dovell: Even though dismissed with prejudice?

The Court: It wasn't dismissed with prejudice. Let's stay well within the record always. It was dismissed—the Court has determined—by stipulation.

This third action, if we can call it that, was commenced about one month or so before the one year period after the enactment of amended tort claims act fixing time. Am I correct in that?

Mr. Dovell: Yes.

The Court: So that I think the Plaintiffs have overcome both of those objections, and I must rule against the Government on both your objections.

Then we get to the merits of the case and, really, we should have had a pre-trial conference. The parties are all here and perhaps we can have one now. You can stipulate to most of these facts. These Federal tort claims are required to be based upon the law of the particular state where they arose and where they are tried.

If under state law and decision the action is maintainable, then the Federal action is maintainable in Federal court. If not, you [15] couldn't maintain an action.

Now here there isn't any question about the fact that if this was a Government operated vehicle that caused injury to an individual, under the laws of this State it would be an action upon which suit could be maintained.

But there is the other issue that has been raised by these pleadings and that was, that this was an emergency vehicle, a fire truck, going to some particular place in reference to municipal activities in the City of Olympia.

Mr. Dovell: Vancouver.

The Court: Or Vancouver. And, if that is a fact, then you refer back to the State Statutes and there is some statute, isn't there, that gives those vehicles the right of way?

Mr. Nelson: Your Honor, the Statute giving emergency vehicles certain immunities towards use of the road says:

“* * * when actually answering an emergency call.”

The Court: Would you stand up, please?

Mr. Nelson: Excuse me, your Honor. The position of the State is that this fire truck is not an emergency vehicle within the provisions of that statute and, further, the fire truck ran into a highway patrol car, which by the same reasoning, if we will use the same statute to define one as the other, was also on an emergency run. But, our position is that the statute which gives immunity exclusively [16] says:

“* * * when actually answering an emergency call.”

The Court: Could it be stipulated as to whether this fire truck was answering an emergency call at the time of the collision?

Mr. Nelson: Our position is that “emergency call” is the technical phrase upon which the outcome of this case depends. We have a brief citing numerous cases. It is an emergency vehicle within the contemplation of a statute very similar to this.

The Court: What I am trying to get at is to see if we can’t simplify and shorten the matter. The parties can agree as to whether this fire truck was responding to a call.

Mr. Nelson: Well, your Honor, in the Defendant’s answer and cross-complaint, he admits that the fire truck was on its way from the Vancouver Barracks, and Army reservation, to the fire house of the City of Vancouver.

The Court: Then it could be stipulated that it was not responding to a call in the sense it was a fire?

Mr. Nelson: We could stipulate that.

Mr. Dovell: We couldn't stipulate to that. It was going to the fire house belonging to the City of Vancouver, and could also go to a fire.

Mr. Parr: That isn't what his point was.

The Court: Was it on its way to a fire?

Mr. Dovell: No, it was not. [17]

The Court: It was not answering a call——

Mr. Dovell: ——to go to a fire.

The Court: But it was going to hold itself in readiness to answer a call. Could the parties stipulate to that?

Mr. Nelson: We can, your Honor.

The Court: Now, what about the highway patrol? Was he answering an emergency call?

Mr. Nelson: He was doing the same thing as the fire truck. He was going to his headquarters and not answering a call.

The Court: With those two stipulations we can take a lot of proof out of the case and then we get down to the question, possibly, of an interpretation—of what you consider—an emergency.

You can stipulate on both sides that both these vehicles, the Government truck and the State patrol officer's conveyance, were public conveyances and were engaged in the performance of their duty but not answering any emergency when the collision occurred.

Mr. Dovell: I wouldn't be advised at this time, your Honor, whether to stipulate that that was not an emergency.

The Court: Well. Mr. Dovell, pre-trial confer-

ences are to get at things that it will not avail you to deny.

Mr. Dovell: Yes, your Honor.

The Court: And we get nowhere with the issues if you do not cooperate. I don't want to argue now but it appears that that is what it was. But I haven't made up my mind whether one, or both, or either of them were classified under the State law as being in that [18] exempt class where they were given the right of way over the road.

You can stipulate, I assume, if the pleadings do not go to that extent, that one vehicle was going in a certain direction upon a certain street and the other in another, and, normally, if they were private vehicles, you could stipulate as to which one would have had the right of way.

Can you do that?

Mr. Dovell: Not very well without the evidence, your Honor.

The Court: Well, you have talked to your people. I want to shorten this if I can, Mr. Dovell. You know in what direction and upon what street or highway this truck was going.

Mr. Dovell: It was going on Tenth Street, and I understand——

The Court: And moving in a northerly or easterly or southerly direction?

Mr. Dovell: In a westerly direction.

The Court: Moving in a westerly direction?

Mr. Dovell: Yes, sir.

The Court: And it approached the intersection of—what is the other street?

Mr. Nelson: Washington Street.

The Court: And Washington Street runs north and south?

Mr. Nelson: It does, your Honor. [19]

The Court: And the vehicle coming up Washington Street——

Mr. Nelson: Was going in a southerly direction.

The Court: And the Government vehicle approached from the right or left?

Mr. Nelson: From the left of the highway patrol.

The Court: So that it would be moving in a westerly direction?

Mr. Dovell: Yes, your Honor.

The Court: And they collided in the intersection?

Now, there is no reason why you can't stipulate to those facts without formal proof.

Mr. Dovell: We can stipulate to that fact, your Honor.

The Court: Very well.

Then, with that stipulation and leaving open the question as to whether either was engaged in an emergency, or falls within the classification of an emergency vehicle, you get the simple question as to whose negligence caused this accident; and that ought to be the only issue that we will have to try here—aside from the measure of damages. Well, the measure of damages likewise need not be tried here.

Mr. Nelson: It was denied in the reply, your Honor.

The Court: Well, do you contend that the State

could not be subrogated to the rights of the driver of the patrol car? [20]

Mr. Dovell: Your Honor, I don't know how much damages were paid. We are agreeing.

The Court: They are undoubtedly part of the record.

Mr. Dovell: If there was some proof——

The Court: Well, this is the time, Mr. Dovell. In these pre-trial conferences we proceed informally and that is what I am doing now. Normally counsel are sufficiently cooperative that they do not need the Court's assistance. If the State has vouchers and claims here of payments, that is all you would need.

Mr. Dovell: That is all I have ever required, your Honor.

The Court: I assume they are willing to show it.

Mr. Dovell: And the amount of money damages can be listed at the same time.

The Court: I suppose. I don't know.

Mr. Nelson: That will be stipulated to, your Honor.

The Court: Very well. So that now, with those stipulations, we have left ourselves pretty much the simple question as to the speed that the vehicles were going at the time and how they approached and whose negligence, if anyone's, it was, or whether the accident was the combined negligence of both parties.

I have another matter that I must take up now for a while and if you could draw up a stipulation

on those facts while we are hearing the other matter, we can get them out of the way.

Mr. Dovell: The Reporter's notes will cover what [21] we have stipulated to, your Honor. I haven't any way of getting them prepared.

The Court: I think that I can hear this case now, since this is out of it; and probably still leaving open this question of emergency that might be involved because I might want some citations and authorities on that.

You better get together and talk this over now as to what you have stipulated to so that you don't come back in here and not agree.

I think I will adjourn this case now until——

Mr. Nelson: Your Honor, we have one witness as to the origin of the record and under the stipulation I think she could be excused and wouldn't be needed. May I excuse her? It was just to testify that this was from the Department of Industries.

Mr. Dovell: I would like to see the record.

The Court: You may see it. It is just that they want to excuse the witness. You may excuse her and then this cause will be adjourned for the time being.

(Whereupon, at 2:45 o'clock, p.m., hearing in the within-entitled and numbered cause was adjourned until 3:30 o'clock, p.m., December 18, 1950, at which time the following proceedings were had, to wit:)

The Court: Mr. Dovell?

Mr. Dovell: Your Honor, we have been able to arrive at a stipulation as to the issues in this case

of State of Washington [22] against the United States of America, restricting it to the controversy of:

“Was the fire truck answering an ‘emergency call’ within the contemplation of Remington’s Revised Statutes, §6360-5 and any others applicable which give certain immunities to emergency vehicles ‘actually responding to an emergency call’?”

And, in case it wasn’t an emergency vehicle, then the question would fall back upon a doctrine that would be applicable to any private vehicle.

The Court: Well, Mr. Dovell, during the recess Mr. Cantlon called my attention to that statute and the statute doesn’t say an emergency vehicle answering an emergency call, but it classifies certain things as emergency vehicles which are sounding sirens or ringing bells and many of those things. I was in error when we considered this before in considering whether it was answering an emergency call. It is stipulated, as I understand it, that both vehicles fell under the classification of what would be an emergency vehicle. One was in the law enforcing arm of the State, a State patrol car, and the other was a fire apparatus belonging to the United States Government going to make itself available to the City of Vancouver.

There is no issue on that, is there?

Mr. Nelson: No, your Honor. [23]

The Court: And then the statute, instead of saying that they had to be going or answering an

emergency call, is silent on that, unless there is a construction of it by the Supreme Court of this State.

Mr. Nelson: Are you speaking of the one that gives the immunities to the emergency vehicles?

The Court: Yes.

Mr. Nelson: Which is 6360—

The Court: Will you just read that?

Mr. Nelson (Continuing): — -5. The provisions of this Act, which is the “Vehicle operation and equipment, etc.” act?

The Court: Yes.

Mr. Nelson:

“The provisions of this act shall be applicable to the operation of any and all vehicles upon the public highways of this state except that they shall not apply in the following cases:

“(a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call or in immediate pursuit of an actual or suspected violator of the law, within the purpose for which such emergency vehicle has been authorized: [24]

“Provided, That the provisions of this section shall not relieve the operator of an authorized emergency vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: Provided, further,

The provisions of this section shall in no event extend any special privilege or immunity in operation of an authorized emergency vehicle for any purpose other than that for which the same has been authorized."

The Court: That isn't what you showed me at the intermission.

Mr. Cantlon (Law Clerk): I believe Section 6360-93 was the one I showed to your Honor.

The Court: Because this one does refer to an emergency call.

Mr. Nelson: Dash 93 says, your Honor.

"Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of [25] every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the public highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a peace officer. Upon the immediate approach of an authorized emergency vehicle, street cars shall be stopped unless otherwise directed by a peace officer. When the operator of any vehicle is complying with the provisions of this section, he shall give proper hand signal indicating his intended movement."

The Court: Were those two statutes enacted simultaneously?

Mr. Nelson: Yes, sir. The Laws of 1937, Chapter 189.

The Court: Well, the last one is sort of a qualifying statute of the first one, which is general in its nature.

Mr. Nelson: I think it is the other way around. I think the last one speaks of emergency vehicles as a class.

The Court: Yes. [26]

Mr. Nelson: It is a general one. The first one speaks of emergency vehicles but says they do not have these immunities unless actually responding to an emergency call.

The Court: Is there a definition in that rule as to what constitutes an emergency vehicle?

Mr. Nelson: There is, your Honor.

The Court: And that brings both of these vehicles involved here within it?

Mr. Nelson: Within it.

The Court: There is no question in your mind, Mr. Dovell?

Mr. Dovell: No, your Honor. Statute 6360-5 illustrates instances but I don't think it is all inclusive. There is no language in that which would make it all inclusive.

The Court: Which is that?

Mr. Dovell: The one counsel has cited.

Mr. Nelson: They were both enacted at the same time, your Honor. But, the laws of 1937, in Chapter 189, has one in section five and the other in section ninety-three.

The Court: Well, they must be read together then.

Mr. Dovell: Yes, your Honor. 6360-5 applies to all vehicles "except those not applicable" in certain instances and then goes on generally to speak of those instances. It says:

"Emergency vehicle exemptions and duties of caution—Road workers and [27] vehicles—Other specific exemptions."

That is the title: "Other specific exemptions."

The Court: I am going to have to examine that law further because I was relying on a specific section, the one defining an emergency vehicle.

So that I think you may go ahead and make your proof on the applicable facts, eliminating, of course, any detail on those things that have been admitted by our previous conference.

Mr. Nelson: Shall I make an opening statement, your Honor?

The Court: I don't think it is necessary, no.

Mr. Nelson: I would like to call Mr. Eldon Parke. [28]

ELDON PARKE

called as a witness for and on behalf of Plaintiffs, upon being first duly sworn, testified as follows:

The Clerk: State your full name for the record, please.

The Witness: Eldon Parke.

The Clerk: Will you spell your name, please?

The Witness: E-l-d-o-n P-a-r-k-e (spelling).

(Testimony of Eldon Parke.)

Direct Examination

By Mr. Nelson:

Q. Will you state your name, please?

A. Eldon Parke.

Q. By whom are you employed?

A. I am employed by the Washington State Patrol.

Q. I didn't hear you.

A. By the Washington State Patrol.

Q. By whom were you employed on the 9th of March, 1945?

A. By the Washington State Patrol.

Q. Where were your headquarters for your employment in March, 1945? A. In Vancouver.

Q. How long had you been stationed out of Vancouver on March 9, 1945?

A. October, 1942. I couldn't give you the exact date.

Q. You went there in October, 1942? [29]

A. Yes, sir.

Q. Mr. Parke, are you familiar with the intersection of Washington Street and Tenth Street in the City of Vancouver? A. I am.

Q. Do you know whether or not on March 9, 1945, Washington Street was an arterial street?

A. It was.

Q. Mr. Parke, will you state whether or not, or, rather, will you state what, if anything, out of the ordinary occurred on the 9th of March, 1945?

A. I was——

(Testimony of Eldon Parke.)

The Court: Just a moment. Washington Street is an arterial running north and south?

Mr. Nelson: Running north and south, your Honor, yes.

A. (Continuing): I was involved in a vehicle collision on that date.

Q. (By Mr. Nelson): Where?

A. On Tenth and Washington Streets, in the intersection, in Vancouver.

Q. Is this area of the City, the intersection of Tenth and Washington Streets, is that in the residential area or the business area, Mr. Parke?

A. That is in the business area. [30]

Q. What were you doing immediately prior to this accident?

A. I was driving south on Washington en route to the State Patrol Office at the foot of Washington Street in Vancouver.

Q. Were you at that time in your regular pursuit as a patrolman? A. I was.

Q. You were on duty? A. I was.

Q. What sort of car were you driving?

A. A 1942 Chevrolet two-door sedan.

Q. Belonging to whom?

A. The State Patrol.

Q. When you reached the intersection of Washington and Tenth Streets, at what speed were you going? A. About——

The Court: That is what time did you say it was?

Mr. Nelson: He hasn't testified to that.

(Testimony of Eldon Parke.)

The Witness: In the vicinity of four o'clock.

The Court: In the afternoon?

The Witness: Approximately. I couldn't say definitely.

Q. (By Mr. Nelson): At approximately four o'clock on the 9th of March, 1945, when you reached the intersection of Washington and Tenth Streets how fast were you going? [31]

A. It would be in the vicinity of twenty (20) miles an hour.

Q. Have you anything that would lead you—have you anything that fixes in your mind as to what makes you think you were going twenty miles an hour?

A. I had to stop at Ninth Street, or Eleventh, where there is a traffic light; stop and wait there and started up and was coming south. I think I had just gotten into high gear before I reached the intersection.

Q. Will you tell us what happened when you reached the intersection of Washington and Tenth Streets?

A. I entered the intersection and I heard a siren just after I entered the intersection and I looked to my left and there was a fire truck almost upon me. It—I don't have a good recollection—I got an impression it was going at a pretty good speed. It is an impression only. It seemed to be coming fast. It struck me almost simultaneously with my seeing it; struck the car, rather. I believe at the time that the collision occurred I was almost south

(Testimony of Eldon Parke.)

of the center of the intersection, because the fire truck, which was going west, was driving in the center of Tenth Street, or to the left of center, and it struck the left rear fender of the patrol car, and my recollection ceased then until I was sliding across the sidewalk out of the car. I don't know in the seconds intervening what took place.

Q. At what angle does Tenth Street intersect Washington Street? A. At right angles. [32]

Q. Mr. Parke, we have a diagram of a right angle intersection (indicating). Does that approximate the angle? Is that a fair representation of the angle at which Washington Street and Tenth Street intersect?

The Court: That will be marked and admitted as an exhibit. You may do that without removing it. Do you have any objection, Mr. Dovell?

Mr. Dovell: No.

The Court: And the witness may step down and mark upon it whereabouts the vehicles were in colored pencil.

(Whereupon, witness went to map on bulletin board.)

A. That seems to be a very good representation of it.

The Court: And that is drawn on the basis of the top being north and the bottom south?

Mr. Nelson: Yes, your Honor.

The Court: And the right east and the left west?

Mr. Nelson: Yes, sir.

(Testimony of Eldon Parke.)

The Court: And it is drawn to scale, is it?

Mr. Nelson: It is drawn on scale, your Honor.

The Court: Very well.

Q. (By Mr. Nelson): Now, Mr. Parke, you testified you were on Washington Street going south and that is a fair representation of the intersection of Washington Street and Tenth Street. Now, will you show us your position when you first knew the fire truck was there and the position [33] you were in which the fire truck struck you?

A. (Whereupon witness sketches upon map.)

Q. What does that represent?

A. I believe that that would be approximately my position when I saw the truck, and I don't think I had progressed—

The Court: I think you can identify that in some manner. Put your initials on there or anything else.

Mr. Nelson: By "1," your Honor?

(Whereupon witness identifies sketch upon map.)

A. (Continuing): I don't believe I progressed the length of the car. Probably I should put that down here (indicating).

Q. (By Mr. Nelson): Make that a little heavier, please, Mr. Parke.

A. I probably progressed about that far when the collision occurred.

Q. And he hit what part of your car?

A. The left rear fender.

(Testimony of Eldon Parke.)

Q. And what do you recall happened after that?

A. My next recollection is I was out of the car and sliding across the sidewalk.

Q. Where was that?

A. It would be off the drawing here (indicating), further out than this is, on this side of the street. There was at that time a used car lot in here. I slid across the sidewalk here into the used car lot at about that location (indicating). [34]

Q. What is the first thing you remember after that?

A. Well, I raised up on my elbows. My leg—I couldn't get up. The fire truck was then turning the next corner over here, south (indicating).

Q. Do you know where your car was at that time?

A. It was almost directly east of me; almost parked at the curb, in very close alignment with the curb, at an angle about fifteen degrees away from the curb.

Q. Do you know how you got out of the car?

A. No.

Q. Do you remember anything that took place from the time you left the car until you found yourself at rest on the ground?

A. I recall the sliding.

The Court: You say the car had come to a stop directly east of you?

The Witness: Yes, sir. It was—it looked as though it had been parked.

The Court: And you were where?

(Testimony of Eldon Parke.)

The Witness: I was laying in this used car lot.

The Court: I get it.

Mr. Nelson: You may take the stand.

(Whereupon, witness resumed witness chair.)

Q. (By Mr. Nelson): What happened immediately after that, Mr. Parke?

A. Well, there was some stranger, passerby, who attempted [35] to straighten out my leg, and I wouldn't permit him to until someone arrived that was at least familiar with first aid, and I believe it was this man that first came there that called an ambulance and notified the State patrol I had been in an accident.

Q. Did the ambulance pick you up?

A. Very shortly; in a few minutes.

Q. Where did they take you?

A. To the Permanente Hospital.

Q. Do you know your injuries?

A. Fracture of the right femur, in the right hip joint; and a fracture of a bone in the arm here (indicating). I can't give you the medical name for that one. And, injuries to both knees and back of my head and hands and forehead.

Q. How long were you in the hospital?

A. Intermittently from the 9th of March until about the first of October. I couldn't give you the right dates.

Q. You say intermittently?

A. I was in for one month the first time and then I went home for a week and then I went back

(Testimony of Eldon Parke.)

to the hospital. I wasn't well enough to stay at home and I came back again and came home again, I should say, on the first of July. I believe the month of July I spent at home, and I was back to the hospital again for a couple of months longer.

Q. Did you pay for your hospital bills?

A. No, sir. [36]

Q. Did you or did you not assign your claim against the person who injured you to the State of Washington? A. I did.

Q. Do you know whether or not the State of Washington paid your bills?

A. I believe they did. I never witnessed any transactions to that effect.

Q. Have you ever received a bill for any treatment? A. No. I never received any bills.

Mr. Nelson: You may cross-examine.

The Court: I have a question. This claim was made against the United States and not the driver of the truck?

The Witness: I don't recollect what it was, but I had the right to either, as I understand it, collect from whoever injured me or to collect from the Labor and Industries Department.

The Court: But this is a special action where you are not seeking to collect from the driver of the truck but the United States Government itself?

The Witness: I understand the action is against the Government of the United States.

The Court: I am assuming that this assignment of the claim is against the United States?

(Testimony of Eldon Parke.)

Mr. Nelson: Yes, your Honor.

The Court: Rather than the operator of the vehicle. I ask that because the statute is very clear that if you elect to hold the [37] operator of the car you can't sue the Government, and, if you sue the Government you can't sue the operator of the vehicle.

The Clerk: Plaintiffs' Exhibits 1 and 2 marked for identification.

(Plaintiffs' Exhibits Numbers 1 and 2 marked for identification.)

(Documents handed to Counsel for Defendant.)

The Court: While Mr. Dovell is examining that I want to ask you, are any of those streets stop streets as far as lights are concerned, or signs on the street corners?

The Witness: There was at that time, I believe, a stop button on the pavement, about where they figure Tenth is there, on both sides of that intersection, and it would be in the same position on the other side.

The Court: But there was no stop sign at the corner?

The Witness: That I couldn't say either way, your Honor.

The Court: Now, had you already entered the intersection, you say, when this fire truck appeared in sight?

(Testimony of Eldon Parke.)

The Witness: Yes, sir.

The Court: And had you heard the siren before you came into the intersection?

The Witness: No.

The Court: Then the fire truck—would you care to estimate the speed of it at all? [38]

The Witness: No, sir; I couldn't answer that one. I had a fleeting impression that it was coming fast.

The Court: How far did it travel after the collision?

The Witness: Well, it never stopped to my knowledge.

The Court: They never came to a stop at all? You never saw them again?

The Witness: No, sir. When I was lying in the used car lot and I raised up, there he was, turning the intersection—making a turn to the west of this one.

The Court: Was the siren sounding then?

The Witness: I didn't hear it, sir.

The Court: That is all. I just wanted to get that clear.

Cross-Examination

By Mr. Dovell:

Q. Mr. Parke, you say that when you were here (indicating) you first heard the siren in this position (indicating) number one?

A. No, I believe that is when I first saw the truck. When I first heard it, it would have been two hundred feet north of there.

(Testimony of Eldon Parke.)

Q. Farther this way? A. Yes, sir.

Q. Then what did you do when you first heard this siren?

A. I looked to see where it was coming from, to locate it.

Q. You didn't move, then, to the side and park?

A. No. [39]

Redirect Examination

By Mr. Nelson:

Q. Mr. Parke, how much time interval was there from the time you first heard a siren until you were struck by the truck?

A. It would have been a matter of a very few seconds; just seconds of time.

Mr. Nelson: That is all.

(Whereupon witness was excused.)

Mr. Nelson: Your Honor, I offer in evidence what has been marked as Plaintiffs' Exhibits 1 and 2.

The Court: What are they?

Mr. Nelson: 1 is proof that Washington Street, upon the date of this accident, was duly designated by the Director of Highways for the State of Washington as an arterial highway. 2 is a duly authenticated copy of the assignment of Mr. Eldon Parke of his action against the United States Government to the State of Washington.

The Court: I assume you have no objection, Mr. Dovell?

Mr. Dovell: No, your Honor.

The Court: They will be admitted.

The Clerk: Plaintiffs' Exhibits 1 and 2 admitted in evidence.

The Court: I think the map will be 1.

The Clerk: You want that number 1?

The Court: Yes. [40]

The Clerk: Then these will have to be numbers 2 and 3.

(Plaintiffs' Exhibits Numbers 1, 2 and 3 marked for identification and received in evidence.)

Mr. Nelson: I would like to call Mr. Ross Kinsey, your Honor. [41]

ROSS D. KINSEY

called as a witness for and on behalf of Plaintiffs, upon being first duly sworn, testified as follows:

The Clerk: State your full name for the record, please.

The Witness: Ross D. Kinsey.

Direct Examination

By Mr. Nelson:

Q. Will you state your name, please?

A. Ross D. Kinsey.

Q. Where do you live, Mr. Kinsey?

A. Vancouver, Washington.

Q. Where did you live on the 9th day of March, 1945?

A. Vancouver, Washington.

(Testimony of Ross D. Kinsey.)

Q. Did you hear the witness who preceded you testify? A. Yes, sir.

Q. State whether or not you witnessed any part of the accident which he related.

A. Yes, sir. I witnessed the accident between the fire engine and the State Patrol car.

Q. Where were you immediately preceding the accident?

A. I was just coming out of the Elks Club on Tenth Street.

Q. Will you come over to this drawing which is a drawing of the intersection at Tenth and Washington Streets?

(Whereupon witness went to map on bulletin board.) [42]

You notice that north is to the top, south to the bottom, west to the left and east to the right. Show the Court approximately where you were when you came out of the Elks Club.

A. Well, the Elks Club sits back about one-third of the way from the corner in the block.

Q. When you came out of the Elks Club, what did you observe?

A. When I first came out I heard the siren and looked back east on Tenth.

Q. What direction is that on this drawing?

A. In this direction. (Indicating.)

Q. Yes?

A. And saw a fire truck coming out on Tenth Street and I watched it proceed down Tenth Street.

(Testimony of Ross D. Kinsey.)

Q. What did you notice about the fire truck?

A. He had his siren on, and the thing most noticeable to me is that when he came across Broadway and Main he came without any appreciable or noticeable slowing down, and then to the intersection of Washington.

Q. Now, where is Main Street in relation to the drawing? A. East.

Q. Does it run parallel to Washington Street?

A. Yes.

Q. Approximately how fast do you think this fire truck was going? [43]

A. It would be hard for me to judge, not being an expert in that matter, and a fire truck is large and noisy, but I would say he was perhaps in the range of twenty-five (25) or thirty (30) miles an hour.

Q. Did you observe him as he reached this intersection?

A. Yes, sir. By the time he reached this intersection I had proceeded on down west on Tenth near the corner.

Q. Did he stop when he got to the intersection?

A. No, sir.

Q. Go ahead.

A. I was standing by there when he came into the intersection and I noticed—after he entered the intersection is when I noticed the State Patrol car. I didn't before because I was watching the fire truck. They met in this vicinity. (Indicating.)

(Testimony of Ross D. Kinsey.)

Q. Will you take a pencil and draw where you think they met?

A. Well, I would say they met——

Q. Can you draw the fire truck on there too, please?

(Witness sketches on map.)

Q. (Continuing): Put your initials on those drawings, please. What occurred after the collision?

A. As I recall it, the fire truck—or State Patrol car—at the time this all happened there was quite a hub-bub and I couldn't tell you which way the State Patrol car flew, but the eventual windup was the patrol car was sitting here and the fire truck was here, and the fire truck backed off and proceeded west on Tenth.

Q. How long did the fire truck stay there? [44]

A. As I recall he didn't any more than get stopped and reversed and stopped and took off down.

Q. Did you see the highway patrolman?

A. I walked across Washington Street and the patrolman was here (indicating) and was being put on a stretcher. The ambulance had arrived before I crossed Washington Street.

Q. At the time of this collision did you notice any other vehicles on Washington Street?

A. I had a dim recollection of another automobile proceeding north.

Mr. Nelson: That is all. You may cross-examine.

(Testimony of Ross D. Kinsey.)

Cross-Examination

By Mr. Dovell:

Q. Did you ever watch any fire truck movements before across there?

The Court: A little louder, Mr. Dovell.

Q. (By Mr. Dovell): Have you ever watched a fire truck go across that intersection at any time?

A. I don't recall that I ever watched a fire truck proceed across Washington at that particular place, but I have witnessed fire trucks in Vancouver.

Q. You saw them coming out of the Barracks on Tenth Street?

A. Yes, sir. When I first noticed the fire truck he was [45] pulling out of the Tenth Street gate to the Vancouver Barracks.

Q. Now, Reserve Street is northeast and southwest at an angle by the Barracks and he was coming across Reserve. Did you notice the siren——

A. Yes.

Q. (Continuing): ——and/or the light?

A. Yes, sir. Just a second, I wouldn't say he had a red light on. I saw the engine; heard the siren.

The Court: How far back are these Barracks? How many blocks back from the place where the accident occurred?

The Witness: One—two and a fraction.

The Court: A little over two blocks?

The Witness: Yes, sir.

Q. (By Mr. Dovell): And in the intersection, the only car then was another car going north besides the patrol car?

(Testimony of Ross D. Kinsey.)

A. I saw a car proceeding north, which would have been past the intersection, but I didn't see the patrol car until the crash.

Q. And you didn't see any other vehicle?

A. Just the one.

Q. And you didn't see what became of that car, whether it pulled off to the side?

A. No, sir.

Mr. Dovell: That is all.

The Court: Well, Mr. Kinsey, as you have [46] pictured the cars at the point of collision, you have the fire truck on the wrong side of the street. Is that what you intend? South of the center? It should have been traveling, if it traveled west, north of what would be the center line.

The Witness: As I recall it, your Honor, when the accident took place, they were south of the center of the intersection—south of the center of the intersection.

The Court: The fire truck was on its wrong side at the time?

The Witness: It would have had to have been, sir.

The Court: Well, was the patrol car on its wrong side of the street?

The Witness: As I recall, the patrol car was in the far lane or his side of the street.

The Court: And did you notice the fire truck making a turn in the intersection or did it come up the street on the wrong side?

The Witness: As I recall it, down Tenth the fire engine stayed to his side of the street. I didn't pay

(Testimony of Ross D. Kinsey.)

any attention to that at the time, but had he been on the wrong side of the street, I think it would have remained in my mind.

The Court: Well, the way you have drawn this illustration on that plat, if he remained on his own side of the street, there wouldn't have been any collision because the patrol car would have been through.

The Witness: Well, it is my impression that at the [47] time the fire truck saw the patrolman, he tried to swing to avoid him. Now that is my impression.

The Court: Do you know what part of the patrol car was struck?

The Witness: He struck, I would say, the rear half of it.

The Court: The rear left side?

The Witness: Well, it would have had to be the left side, yes, sir.

The Court: In back of the center of the patrol car?

The Witness: Well, when I saw—when it struck, I would say it was the back half. Now, I wouldn't say whether it was beyond the center line or not.

The Court: And then you say he came to a stop afterwards?

The Witness: And when the patrol car came to rest here, the fire truck was headed into him and he stopped and backed up and proceeded down Tenth Street.

(Testimony of Ross D. Kinsey.)

The Court: Did you notice any marks on the pavement; any tire marks?

The Witness: No, sir. I didn't notice or look for any.

The Court: That is all.

Q. (By Mr. Dovell): Mr. Kinsey, how far south of the intersection would you estimate it that the accident occurred? How many feet? [48]

A. Well, that is a ticklish question, but as I recall it, when they came together they were south of the center line of the intersection and veered off. Whether it happened at the time of the impact or whether the fire engine swung this way to avoid him, I don't know, but one way or another—perhaps by the nature of the impact—they came together at this point.

Q. But you are not really sure that the impact itself took place below the center line, are you? You are not positive on that, are you?

A. No, sir, I am not positive; but that is my impression.

Mr. Dovell: That is all.

Mr. Nelson: That is all.

(Whereupon the witness was excused.)

Mr. Nelson: I would like to call Arnold Kurtz, your Honor. [49]

ARNOLD KURTZ

called as a witness for and on behalf of Plaintiffs,
upon being first duly sworn, testified as follows:

The Clerk: State your full name for the record,
please.

The Witness: Arnold Kurtz, K-u-r-t-z (spelling).

Direct Examination

Q. (By Mr. Nelson): Where do you live, Mr.
Kurtz? A. Portland.

Q. Where are you employed?

A. Vancouver; Ford Agency in Vancouver.

Q. Washington? A. Washington.

Q. And on the 9th of March, 1945, where were
you employed, Mr. Kurtz?

A. At the Ford Agency at Tenth and Washing-
ton in Vancouver.

Q. You have heard these two witnesses speak of
an accident which occurred at the intersection of
Tenth and Washington Streets in Vancouver, Wash-
ington, on the 9th of March, 1945. Do you know
anything, of your own knowledge, of that accident?

A. Yes, I do.

Q. Will you tell us what you know about it, Mr.
Kurtz?

The Court: Let me suggest that he tell the [50]
Court where his place of business is. He said Tenth
and Washington. Which one of those four corners?
The top is north and the right is east and so on.

(Whereupon the witness went to map on bul-
letin board.)

(Testimony of Arnold Kurtz.)

Q. (By Mr. Nelson): North, east, south and west (indicating directions).

A. Right here. (Indicating.)

Q. What business is that, Mr. Kurtz?

A. Ford Agency.

The Court: On the northwest corner?

The Witness: Yes.

The Court: Of the intersection.

Q. (By Mr. Nelson): How did you happen to observe this accident, Mr. Kurtz?

A. This is north, south, east and west (indicating)?

Q. Yes. How did you happen to observe the accident?

A. I was standing in the window at the time.

Q. Did you hear a siren? A. Yes, I did.

Q. Just what did you observe, Mr. Kurtz?

A. I observed this fire engine.

Q. Where was the fire engine when you first heard the siren; do you know?

A. I don't know. Where has this fellow got the Elks Club? [51] About in here.

Q. Describe what you saw, please?

A. It was coming down towards Washington Street.

Q. Can you give us any idea how fast he was going?

A. I would say twenty-five (25) miles an hour.

Q. Was he sounding his siren? A. Yes.

Q. Go ahead and describe what happened?

A. I saw him. He was coming down about the

(Testimony of Arnold Kurtz.)

center of the block, and when he got to Tenth Street here, of course from my position in the window I couldn't see the state patrol car, but when he came into the intersection I saw him making a turn to the left, and saw the State Patrol car and saw them both hit about in this vicinity.

Q. What happened then?

A. The Government truck put him over on this curb.

Q. Did you observe what happened to the State patrolman? A. No, I didn't.

Q. Where was the fire truck now, after the accident?

A. The fire truck was heading this way.

Q. And what did he do after the accident?

A. He backed up and went down Tenth.

Q. Did you see how far he went on Tenth?

A. Yes.

Q. How far did he go?

A. One block and turned left. [52]

Q. Did he still sound his siren?

A. He still sounded his siren in the middle between Washington and Columbia.

Mr. Nelson: You may cross-examine.

Cross-Examination

Q. (By Mr. Dovell): Did you see a red light on the fire truck? A. No, I don't recall.

Q. But you recall the siren?

A. I recall the siren.

(Testimony of Arnold Kurtz.)

Q. Was that sound loud?

A. No, it wasn't awfully loud.

Q. Just a fire siren, an ordinary fire truck siren?

A. Just like a fire truck siren.

Mr. Dovell: That is all.

(Whereupon the witness was excused.)

Mr. Nelson: Your Honor, these people live in Vancouver. I wonder if it would be possible for the ones who testified to be excused?

The Court: Yes, they will be excused. What was Mr. Kurtz's business?

Mr. Kurtz: Ford agency.

The Court: Mr. Kinsey, what is your business?

Mr. Kinsey: Motion picture projector.

The Court: All right. [53]

ELMER E. NELSON

called as a witness for and on behalf of Plaintiffs, upon being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Elmer E. Nelson.

Direct Examination

Q. (By Mr. Nelson): Mr. Nelson, you have heard these witnesses testify as to an accident which occurred on the intersection of Tenth and Washington Streets in the City of Vancouver, on March 9, 1945?

A. I have.

Q. Do you know of your own personal knowledge anything about this accident?

(Testimony of Elmer E. Nelson.)

A. I seen the fire engine when it went past me.

Q. Will you come over here and point out on this drawing, which is a drawing of the intersection of Washington and Tenth—this is north, south, east and west. (Indicating.)

(Whereupon witness went to map on bulletin board.)

The Court: Mr. Nelson, what is your occupation?

The Witness: I am owner and operator of a service station.

The Court: On one of these four corners?

The Witness: No. I was back about half way into the next block east of this intersection on the north side of the block, or street. [54]

Q. (By Mr. Nelson): Now, let me get this straight. You mean it is a street running parallel to Washington Street to the right?

A. Main Street runs north and south the same as Washington and Tenth runs between Main and Washington.

Q. Were you on Main Street?

A. No. Between Washington and Main on the north side.

The Court: On the north side of Tenth Street?

The Witness: Yes, sir.

Q. (By Mr. Nelson): What did you observe?

A. I observed the fire engine as it went past and the siren was going and I just got out of my car as the fire engine went by. It was going approximately thirty (30) miles an hour; and I would say “ap-

(Testimony of Elmer E. Nelson.)

proximately” because a fire engine, army color, is kind of hard to observe at best. But, I seen the tail end of the fire engine here and I didn’t see him any more but I heard the collision. I proceeded on west to Washington Street and the fire engine had already gone on, and I came to where the State patrolman was and where his car was located.

Q. Did you see the fire truck leave after the crash?

A. No, I didn’t see him leave because I was obstructed by the other traffic that came by right behind the fire engine.

Q. Where was the State Patrol car when you reached the intersection there?

A. When I reached the intersection here the State Patrol [55] car was about, I would say, between fifty (50) and sixty (60) feet south of the southwest corner and it was bumped up against the curb and in the rear of another car. The doors was open and I do remember of seeing someone take part of the State Patrolman’s radio up back in the street, but I wouldn’t say how far because I seen them with part of the radio in their hand.

Q. Do you remember noticing on the State Patrol car where it had been hit?

A. The State Patrol car had been hit on the left rear fender almost directly on the left rear wheel. The center of it.

Mr. Nelson: You may cross-examine

(Testimony of Elmer E. Nelson.)

Cross-Examination

Q. (By Mr. Dovell): You were standing about the middle, between Main and Washington, on the north side of Tenth? A. Yes, sir.

Q. Now, in connection with your position, where was the fire truck traveling when you saw it?

A. The fire truck was traveling more towards the center of the street.

The Court: Well, was it north or south of the center?

The Witness: Well, I would say it was almost right due in the center.

The Court: It was partly on the wrong side of the street? [56]

The Witness: Yes, at that time.

The Court: Is that what you mean?

The Witness: Yes, sir.

Q. (By Mr. Dovell): You wouldn't be sure, though, that it was on the wrong side of the street, would you?

A. Well, I remember back that there was a car parked just behind, or sort of behind, me in a double parked position so that would automatically make the fire engine go over past the center of the street.

Mr. Dovell: That is all.

The Court: Did you notice, out in the intersection after the accident, where these cars came together?

The Witness: No, I didn't.

(Testimony of Elmer E. Nelson.)

The Court: You didn't see any broken glass or anything else that showed a point of contact?

The Witness: No, your Honor.

Redirect Examination

Q. (By Mr. Nelson): Where was it that the piece of radio equipment was picked up?

A. I don't know. When I noticed the radio equipment being picked up the party was almost at the vehicle.

The Court: On the southwest corner?

The Witness: That would be the southwest [57] corner. The State Patrolman had gone across the sidewalk and was lying on his back up against, or underneath—partially underneath—a used car in that used car lot.

Mr. Nelson: That is all.

(Whereupon the witness was excused.)

Mr. Nelson: If your Honor please, in the regular file there should be three depositions.

The Court: I haven't the file. (File handed to Court.) There apparently are some depositions. And some depositions on the part of the Defendant also.

Mr. Nelson: Those depositions have to do with the amount of money expended by the State of Washington on this accident. They don't deal with anything else, do they?

Mr. Parr: No. Shall we read them to your Honor?

The Court: Unless Mr. Dovell insists. I thought you could stipulate.

Mr. Dovell: We stipulate on the amounts of damages, but, of course, the witness for Defendant is not in that regard. But, it is a very short deposition.

Mr. Parr: There are three for the Plaintiffs, mainly on the amount expended.

The Court: Well, I will let you read them into the record, but I think I will let you wait until tomorrow.

Mr. Dovell: Your Honor, I have one witness from Vancouver who would like to get back home and I would like to present [58] his evidence this evening.

The Court: Very well. It is late, but I will let you call him out of order without prejudicing the rights of Plaintiffs.

Mr. Nelson: Thank you, your Honor. With the exception of the depositions, the Plaintiffs rest.

Mr. Dovell: Thank you, your Honor. [59]

CLARENCE B. NELSON

called as a witness for and on behalf of Defendant, upon being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Clarence B. Nelson.

Direct Examination

By Mr. Dovell:

Q. Mr. Nelson, where did you live or reside on March 9, 1945?

(Testimony of Clarence B. Nelson.)

A. I resided at the Central Fire Station, Vancouver Barracks.

Q. What were your duties there?

A. Truck driver in the fire department.

Q. Do you recall receiving a call to move the fire truck on that date? A. Yes.

Q. Will you explain in regard to that what your duties were?

A. This call came from the City of Vancouver through our switch board in the fire station and the operator on the switch board dispatched the truck out on the call. I was the driver. There were two (2) men with me on the truck.

Q. And what are their names?

A. Valdez and Cornell.

Q. Was this under any agreement with the City or why were you called? [60]

A. Yes, it was. There had been a verbal agreement for fifteen (15) years at the time I was there that the City and Vancouver Barracks would help each other out in emergency cases.

Q. And what did you understand you were to do on this call?

A. Well, to take the fire truck and go down to the City of Vancouver. They had a route picked out to go.

Q. What route was that?

A. Out the Barracks to the Tenth Street gate and down Tenth Street, across Tenth and Washington, then Columbia and turn left to Eighth and back one-half block on Eighth to the fire station.

(Testimony of Clarence B. Nelson.)

We were to proceed from the fire station to the Tenth Street gate without the siren and red light. After we got outside the reservation we used the red light and siren.

Q. I didn't hear.

A. We were to proceed from the fire station to the entrance, Tenth Street entrance, without the siren or red light and outside the military reservation we were to use the siren and red light.

Q. What did you do then? Describe your trip from the time you reached the city limits of Vancouver.

A. Well, we came out of the Tenth Street entrance.

The Court: Well now, how far was this Tenth Street entrance from the intersection shown here? How many blocks?

The Witness: Approximately five (5) [61] blocks.

Q. (By Mr. Dovell): Now, when you started down Tenth Street, what did you do, and what direction did you take?

A. We proceeded west on Tenth Street.

Q. What side of Tenth Street?

A. Right side.

Q. And did you sound your siren?

A. Yes. And also the red light. They are both on the same control. The siren and red light are together.

Q. Describe then what you saw as you approached Washington.

A. Well, the visibility was fair.

(Testimony of Clarence B. Nelson.)

Q. Was it raining?

A. It was misting; yes, a little. I didn't see the State Patrol car until I was right upon it.

Q. You had already entered the intersection without seeing the patrol car? A. Yes.

Q. And describe just what happened then.

A. Well, as I recall it, we hit the State Patrol car on the left rear fender and it spun the State Patrol car out of my way and I proceeded on through the intersection without backing up.

Q. You didn't have to back up? A. No.

Q. How fast were you going before you reached Washington [62] Street?

A. Approximately thirty (30) miles an hour. When I came to the intersection of Tenth and Washington I knew there was a stop sign and I slowed down to approximately twenty-five (25) miles an hour and applied my brakes when I saw the patrol car.

Q. Did you make any turn in the intersection?

A. Not that I recall, no. I cleared the patrol car out of the way and stopped as I—on the other side of the intersection. I stopped momentarily and I looked back. As I stopped all I saw was the patrolman going out of the car. My first impression after that was to proceed to the fire department at the City Fire Station, and, as soon as I arrived at the City Fire Station, I dispatched the ambulance out to pick up the patrolman.

Q. Did you see the driver of the patrol car after the accident at any time?

(Testimony of Clarence B. Nelson.)

A. Yes, two days after out at Northern Permanente Hospital.

Q. Did you have any conversation with him?

A. Yes.

Q. Did he make any statement to you?

A. The statement, as I recall, was he stated he heard the siren but didn't know where it was coming from.

Q. There wasn't anything said about not parking off to the right? A. No. [63]

Q. Now, when you reached the Vancouver City Fire Station, did they require you to answer to a fire call from there?

A. Yes. The only time—our truck was dispatched down there was when the City of Vancouver had all their apparatus out on a fire and we were called on an emergency stand-by in case another fire broke out. If that was the case we would have to dispatch another fire truck from the Vancouver Barracks in place of one already out.

Q. What were your orders after you would leave the Vancouver Fire Station to return to your Barracks? What would your orders be then?

A. To proceed back under normal conditions without the siren.

Q. Had you ever made a run like this before?

A. Yes, frequently.

Q. Did you make it under the same conditions?

A. Yes.

Q. In making this run did you ever stop at any stop signs?

(Testimony of Clarence B. Nelson.)

A. Not that I recall. We would slow down and then proceed.

Q. Did you have any accidents before?

A. Any accidents before?

Q. In that regard? A. No.

Mr. Dovell: You may cross-examine.

The Court: Before you do that, I wish Mr. Nelson [64] would step down and see if he agrees with any of the drawings down there as to point of collision of the two vehicles.

(Whereupon witness steps to map on bulletin board.)

The Witness: I agree with Mr. Parke's drawing here.

The Court: That is the State patrolman's?

The Witness: Yes.

Q. (By Mr. Dovell): What do you mean you agree? In what way?

A. That he was hit approximately here and not down here, as I recall it.

Q. Do you mean that you agree with his position of number one or number two?

A. It was approximately between number one and number two position.

The Court: Well, number one and number two, Mr. Dovell, overlap, do they not? Number one is the vehicle as when he first heard the siren or saw you approaching and number two is where it had moved when contact was had. That was the witness Parke's testimony, as I recall it.

(Testimony of Clarence B. Nelson.)

Mr. Nelson (Counsel for Plaintiffs): That is right.

Mr. Dovell: I would know, your Honor, whether Mr. Nelson (witness) saw Mr. Parke's diagram or not. He was sitting back here.

The Witness: I saw it. I have had plenty of instruction in driving. [65]

The Court: I can't hear.

The Witness: We were instructed on driving a fire truck long enough to know not to drive on the wrong side of the street. I was on the right side of the street.

The Court: And you were part of the military personnel at that time, were you?

The Witness: Yes, your Honor.

Q. (By Mr. Dovell): What are you engaged in now?

A. I work for the Veterans Administration.

The Court: That is all. You may take the stand again.

Mr. Nelson (Counsel for Plaintiffs): While he is here I would like to ask a question, if I may.

Cross-Examination

By Mr. Nelson:

Q. Mr. Nelson, point out where Mr. Parke's car was at the time you hit him.

A. Approximately between number one and number two on this diagram.

Q. All right. Now approximately where was Mr. Parke's car when it came to rest?

(Testimony of Clarence B. Nelson.)

A. Approximately on the southwest corner.

Q. And where was the fire truck when it came to rest?

A. Approximately over here, cleared of the intersection. [66]

Q. Before you started continuing on your trip, did you reverse and back up? A. No.

Q. You didn't back up?

A. No. When I hit the patrol car it spun it out of my way and I stopped across the intersection.

Q. How long did you stop there?

A. Half a minute, more or less.

Q. Why did you stop there?

A. It is hard to explain. I stopped there, turned around to look, and saw the patrolman flying out of his car, and then it was my impression to go down to the fire station.

Mr. Nelson (Counsel for Plaintiffs): You may take your seat here.

(Whereupon witness resumed witness chair).

Q. (By Mr. Nelson): Mr. Nelson, at the time you received the message at the fire house to take the fire truck out of this Army fire house, you did not think at that time that you were going to a fire, did you?

A. I knew I wasn't going to a fire. It was stand-by.

Q. You knew that you were going to the Vancouver Fire Station to stand by? A. Yes.

Q. Now, when you got your truck to the Van-

(Testimony of Clarence B. Nelson.)

couver Fire Station, you testified you had done this quite a few times, you had then [67] to put the fire truck inside the fire house? A. Yes.

Q. Did you park inside?

A. Inside the fire house facing outwards.

Q. I presume so that you could take off at a moment's notice? A. Yes.

The Court: The City's fire truck was out answering a call at that time?

The Witness: Yes, sir; all of their equipment.

Q. (By Mr. Nelson): Mr. Nelson, at the time you hit Mr. Parke's car, what was the estimate of your speed?

A. Approximately twenty-five (25) miles an hour.

Q. You did not, of course, stop when you got to the intersection of Tenth and Washington Streets?

A. No.

Q. Did you look in either direction to see whether there were vehicles that you might run into?

A. I don't remember.

Mr. Nelson: That is all, your Honor.

The Court: Anything further, Mr. Dovell?

Mr. Dovell: I believe not, your Honor.

The Court: That is all, Mr. Nelson.

(Whereupon the witness was excused.) [68]

The Court: Now I think we will take an adjournment until ten o'clock tomorrow morning, and you can put your depositions in evidence and the

Government can put in what further evidence they have.

(Whereupon, at 4:40 o'clock p.m., December 18, 1950, proceedings in the within-entitled and numbered cause were adjourned until 10:00 o'clock a.m. December 19, 1950, at which time the following proceedings were had, to wit:) [69]

December 19, 1950, 10:00 A.M.

(Counsel heretofore noted, excepting C. R. Nelson, Esq., being present, the following proceedings were had.)

The Court: Docket 1326, State of Washington vs. United States of America. You may proceed.

Mr. Parr: If the Court please, we have a brief of some eight pages that I would like to submit to the Court. Your Honor, Mr. Nelson has your Honor's original and another copy. I have my own copy. I expected him here. I don't understand why he is not here.

The Court: Well, you probably want to use your brief in making your argument.

Mr. Parr: Yes, if the Court please.

The Court: These trial briefs are of little value to the Court if they come at the last moment; but, if there is anything unique in your argument that indicates doubt in the mind of the Court that I feel I want to examine it more closely, why I will do so.

Mr. Parr: We have, in this brief, summarized the State's case and we have also summarized a number of Federal Court cases that have been

tried on this same question as to whether or not this was an emergency or not an emergency.

The Court: Well, I will be glad to let you submit that; and isn't there further evidence you want to offer? Didn't you have some depositions?

Mr. Parr: Yes, if the Court please, and this plat we [70] would like to offer as an exhibit just to show the testimony, or accompany the testimony of——

The Court: Yes. It was admitted yesterday, Mr. Parr.

Mr. Parr: And the depositions are all in the files, if the Court please.

Mr. Dovell: Do you want to read the questions or answers?

Mr. Parr: Either way.

(Whereupon, C. R. Nelson, Esq., appeared and was present during the following proceedings, to wit.)

Mr. Dovell: How many are there?

Mr. Parr: There are three depositions. Yes, Dr. Dwyer, Dr. Lucas, and Mr. Hamby.

Mr. Dovell: And I have one.

Mr. Parr: Should I read answers and you the questions?

Mr. Dovell: Yes.

(Whereupon, Mr. Parr assumed the witness chair.)

Mr. Dovell: These are the interrogatories ad-

dressed to Mr. Rex Hamby. You have the answers?
Mr. Parr: Yes.

(Whereupon, the following interrogatories and answers thereto were read by Mr. Dovell and Mr. Parr, respectively.) [71]

REX C. HAMBY

having been called to appear before Donald G. Simpson, a Notary Public in and for the State of Washington, residing at Vancouver, Washington, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. Please state your name?

A. Rex C. Hamby.

Q. What official position, if any, do you hold with the Northern Permanente Foundation—Northern Permanente Hospital?

A. Business Manager and Assistant Treasurer.

Q. Did you hold that position on or about March 9, 1945? A. No.

Q. Who has custody of the books of accounts showing payments of the inmates of the hospital?

A. Immediate custody of the books of accounts is with Berniece Oswald, Chief Accountant; official custody is with me as Business Manager. Berniece Oswald is directly under my supervision.

Q. Have you the original records of time and care at your hospital of Eldon Parke?

A. Yes.

Q. Referring to those records would you kindly

(Deposition of Rex C. Hamby.)

tell us when Eldon Parke first came to your hospital? [72] A. March 9, 1945.

Q. How long did he stay at the hospital for treatment?

A. Intermittently until October 24, 1945, for a total of 156 days in the hospital.

Q. When did he leave the first time?

A. April 5, 1945.

Q. Did he return after that time? A. Yes.

Q. Please state the date he returned?

A. April 24, 1945.

Q. How long was he in the hospital this second time? A. Until July 5, 1945.

Q. Please state any other time that he left the hospital and then came back?

A. He left on July 5, 1945, and returned July 29, 1945, and stayed until October 24, 1945.

Q. Who was the Doctor that attended him at first? A. Dr. F. J. Dwyer.

Q. What other Doctor attended him while at the hospital?

A. Dr. Walter Noehren, Dr. E. W. Saward, Dr. E. V. King, Dr. M. Ruzicka, Dr. Leo S. Lucas, and Dr. J. C. Woodward, Jr.

Q. Was any hospital equipment used in his treatment?

A. Yes, hospital bed, X-ray machine and laboratory equipment. [73]

Q. What charges were made for the use of this equipment?

(Deposition of Rex C. Hamby.)

A. For X-ray and laboratory equipment, \$231.50. Charges for other equipment such as beds were included in daily hospital ward rates which generally cover room, board and nursing care.

Q. How much were the payments that were made to you for the services the hospital rendered to Mr. Parke?

A. Total payments made for the services the hospital rendered to Mr. Parke were \$1,638.96, including physicians services billed through the hospital in the amount of \$300.00.

Q. Who made these payments?

A. State of Washington, Department of Labor and Industries.

Q. Were the payments made all at one time?

A. No, they were not.

Q. If they were not made at one time, will you state when they were made?

A. On June 20, 1945, we received \$24.00; on October 20, 1945, \$1,123.20; on November 20, 1945, \$461.76; on January 20, 1946, \$20.00; on February 20, 1946, \$10.00.

Q. What was the total amount that the Department of Labor and Industries paid to your hospital for the care, medical treatment and services rendered to Mr. Parke? A. \$1,638.96.

Q. What was the total of all——

Mr. Dovell: You remember we struck that last interrogatory out? [74]

Mr. Parr: Yes.

(Deposition of Rex C. Hamby.)

Mr. Dovell: I think there were some cross-interrogatories also.

Q. Were the charges you have stated in answer to direct interrogatory number sixteen made at the usual rate charged other patients for similar services by your hospital? And, if not, state why not and the difference in charges, if any?

A. Laboratory and X-ray charges were made at the usual rate charged other patients for similar services by my hospital.

Q. Please answer the foregoing question as to direct interrogatory number seventeen?

A. No. The ward rate charged Mr. Parke was \$5.50 per day; and the usual ward rate was \$6.00 per day. Some charges for medicine were less than the usual rates. No charges to Mr. Parke were in excess of the usual rate. The reason for the lesser charges indicated was to conform to the rates established by the state for such services.

Mr. Parr: Dr. Dwyer is next. [75]

FRANCIS J. DWYER

having been called to appear before Josef Zelasko, a Notary Public in and for the State of Washington, residing at Aberdeen, Washington, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. Will you please state your name?

A. Francis J. Dwyer.

Q. Where do you reside at this time?

A. Aberdeen, Washington.

(Deposition of Francis J. Dwyer.)

Q. What is your profession?

A. Orthopedic physician and surgeon.

Q. Are you a duly licensed and practicing physician and surgeon in the State of Washington?

A. Yes.

Q. In what branch of medicine do you specialize? A. Orthopedics.

Q. Doctor, have you, at any time, been in charge of a portion of the Northern Permanente Hospital? A. Yes.

Q. What portion of specialty in the hospital were you in charge of?

A. Orthopedic Department.

Q. Do you know Eldon J. Parke?

A. Yes. [76]

Q. Has he ever been your patient?

A. Yes.

Q. When was that, Doctor?

A. I first saw Mr. Parke March 9, 1945.

Q. Where were you at that time?

A. Vancouver, Washington.

Q. When did you first see Mr. Parke as a patient at the Northern Permanente Hospital?

A. March 9, 1945.

Q. When was he admitted there?

A. March 9, 1945.

Q. What was his condition when you first saw him?

A. Mr. Parke was suffering from a fracture of the right femur and the right wrist.

Q. What did you do for him at that time?

A. Mr. Parke was taken to the operating room

(Deposition of Francis J. Dwyer.)

and a closed reduction of the femur with pinning and external rod fixation and cast was performed. Closed reduction and cast to the right wrist was also performed.

Q. How long was Mr. Parke under your care at the hospital?

A. Until he was discharged 9-24-45.

Q. Was surgery performed by you?

A. Yes.

Q. What was his condition when the surgery was performed? [77]

A. Mr. Parke was suffering from the above-mentioned fracture of the femur and wrist.

Q. How long was he in the hospital, Doctor?

A. Mr. Parke was first discharged 4-5-45; was readmitted 4-24-45; redischarged 7-5-45; readmitted 7-29-45 and received final discharge 9-24-45.

Q. Was he under your care all this time?

A. Yes.

Q. When was he discharged? A. 9-24-45.

Q. Will you kindly state his condition when you last saw him?

A. Mr. Parke had a delayed union of the fractured femur with considerable limitation of motion of the right knee joint.

Q. How long did you treat him for the condition that you found him in?

A. From the date of admittance, 3-9-45 to date of discharge 9-24-45.

Q. Was any other Doctor called in to assist in any manner or way in the treatment of Mr. Parke?

(Deposition of Francis J. Dwyer.)

A. Yes.

Q. Please state the name or names of the Doctor or Doctors?

A. He was seen by Dr. Leo Lucas in consultation August 27, 1945. [78]

Q. How much were you paid for the services you performed for Mr. Parke?

A. I was on a fixed salary.

Mr. Dovell: No further answer to that?

Mr. Parr: No, no further answer.

Q. Who paid for the services that you performed for Mr. Eldon Parke?

A. Northern Permanente Foundation Company paid me.

Q. Who took over, if you know, Doctor, after you left the hospital?

A. Dr. J. C. Woodward, Jr.

Mr. Dovell: And no cross-interrogatories.

Mr. Parr: These are the interrogatories now propounded to Dr. Leo S. Lucas. [79]

LEO S. LUCAS

having been called to appear before Ray D. Shoemaker, a Notary Public in and for the State of Oregon, residing at Portland, Oregon, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. Please state your name?

A. Leo S. Lucas.

Q. Where do you reside?

(Deposition of Leo S. Lucas.)

A. Portland, Oregon.

Q. What is your profession?

A. Orthopedic surgeon.

Q. Are you a duly licensed and practicing physician and surgeon in the State of Washington?

A. No, I am in the State of Oregon.

Q. What is your specialty?

A. Orthopedic surgery.

Q. Are you acquainted with Eldon Parke?

A. I am, as a patient under my treatment.

Q. Were you called the year 1945 to treat Mr. Parke? A. Yes.

Q. Where did you treat him?

A. I first saw this patient in the Permanente Hospital, Vancouver, Washington, in consultation with Dr. Dwyer, about August, [80] 1945. He later came under my observation and I saw him in my office on December 11, 1945, and on nine other occasions in our physiotherapy department.

Q. What was his condition at that time?

A. His condition when I last saw him was improving. It was possible for him to extend his knee 180 degrees, which was straight, and to stretch his knees to 90 degrees, which is a right-angle. His strength was improving, he had no limp, and he was able to work.

Q. What services did you perform for him?

A. I saw him in consultation with Dr. Dwyer and then later saw him in my office, at which time I instructed him in how to improve the strength of

(Deposition of Leo S. Lucas.)

his muscles and how to obtain more movement in his knee joint.

Q. What hospital was he in at that time?

A. When first seen he was in the Permanente Hospital, Vancouver, Washington.

Q. Did you make more than one visit to him, Doctor?

A. Yes; in the hospital and in my office.

Q. What surgery, if any, did you perform?

A. I did not operate upon him.

Q. Were you paid for your services?

A. Yes.

Q. Who was it that paid the bill?

A. The Department of Labor and Industry, of the State of Washington, paid the bill. [81]

Q. What was the total amount for your services?

A. We were paid \$159.75.

Q. Will you state, Doctor, whether or not that was a reasonable sum for the services performed?

A. Yes.

Mr. Dovell: And there were no cross-interrogatories.

The Court: Is that the Plaintiffs' case now?

Mr. Parr: If the Court please, coupled with, as I understood, the stipulation. There were other things, if the Court please, that were paid—time lost and regular P.P.D. That is the regular payment that the Department of Labor and Industries makes. Does our stipulation go into that?

Mr. Dovell: I think our stipulations covered the amounts of damages on both sides.

The Court: Do you have anything further in your case for the Defendant, Mr. Dovell?

Mr. Dovell: Your Honor, I have the deposition of Mr. Cornell that I would like to read in evidence.

The Court: Very well.

(Whereupon the following interrogatories and answers thereto were read by Mr. Parr and Mr. Dovell, respectively.) [82]

HOBART C. CORNELL

having been called to appear before Anthony De-Angelo, a Notary Public in and for the County of Otsego, State of New York, residing at Oneonta, New York, to answer certain interrogatories propounded to him, and having been first duly sworn, testified thereto as follows:

Q. State your name, residence, and your previous military service, if any.

A. Hobart C. Cornell, Hartwick, N. Y. I was in the U. S. Army Transportation Outfit at Vancouver, Detachment B. As a fireman my duties were to ride the fire truck to fires.

Q. State whether or not you were in the military service on March 9, 1945, and if so, where you were stationed, in what capacity, and what duties it included.

A. Yes, I was in the military service on March 9, 1945. I was stationed at Vancouver as Private First Class and was attached to the Transportation Unit as stated in A. 1.

Q. State whether or not you were in any way in-

(Deposition of Hobart C. Cornell.)

volved in an accident on March 9, 1945, between a Government fire truck and a State Patrol car which occurred at the intersection of Tenth and Washington Streets in Vancouver, Washington.

A. Yes.

Q. If your answer to question three is in the affirmative, then please state where you were and with whom, if anyone. [83]

A. I was the only man on the back end of the fire truck. The others on the truck with me were the driver, Corporal Nelson, and Private Valdez, who was riding in the front seat with the driver.

Q. If your answer to question four is that you were riding on the Government fire truck, then please state where on the truck you were riding, at which place you got on the truck, and the approximate distance it had travelled prior to said accident, and the route thereof, if you recall.

Q. I was standing on the rear platform of the truck and hanging on to the end of the truck. I boarded the truck at the Fire Station at Vancouver Barracks. I would estimate the distance from the Post Fire Station to the place of the accident at approximately one-quarter of a mile. The truck left the Post Fire Station by way of Tenth Street gate and proceeded west along Tenth Street until the truck reached the intersection of Washington Street where the accident occurred.

Q. State whether or not the siren on the Government fire truck was sounded while en route preceding said accident.

A. It was.

(Deposition of Hobart C. Cornell.)

Q. If your answer to question six is in the affirmative, then please state to what extent in time said siren was sounded while the said fire truck was en route preceding said accident.

A. It was blowing steady from the time we left the Station.

Q. Did you see the collision? [84] A. No.

Q. State whether or not you felt the impact of the truck and patrol car, and if so, at what point in the intersection.

A. Yes. When the front end of the fire truck was near the center line of the intersection I felt the impact of the collision.

Q. Do you recall the condition of the weather on the day of the accident, and, if so, please state.

A. I have no recollection of the weather at that time.

Mr. Dovell: And no cross-interrogatories. That is the Defendant's case, your Honor.

The Court: I assume you have no rebuttal?

Mr. Nelson: No, your Honor.

The Court: Do you desire to argue this matter?

Mr. Nelson: Your Honor, our argument is contained in our brief. If the Court please——

The Court: The brief has just come to me. I have checked it through as quickly as I could here. I notice you rely on California cases.

(Whereupon argument was made by Mr. Nelson on behalf of Plaintiffs, and the following proceedings then had.) [85]

The Court: I don't care particularly for you to make an argument, Mr. Dovell. Not that I mean any disrespect at all, but I am going to have to find against the Plaintiffs in this case and I will state my reasons. And I must so find even after listening to the persuasive argument of Mr. Nelson.

The facts in this case are scarcely in dispute at all.

The driver of the State Patrol car, the State Patrol officer, is of the character and type of witness that any Court enjoys having because he was candid and frank and he didn't attempt to shield himself or didn't attempt to shift responsibility. The same can be said of the driver of the Government fire truck. They were both very frank.

The witnesses who testified as to the point of collision were all people worthy of respect and I would say of high credibility, but like persons who suddenly see something, they differ as to minor details.

Now, all the witnesses, except the principles, placed these two vehicles down towards the southwest corner of that intersection. The driver of the truck—the patrol car—places himself just about across the center line of that intersection. The driver of the fire truck puts him about at the same spot, the fire truck having struck the rear of the patrol car.

Thus the Court finds that these cars came in contact at about the point in the intersection indicated by the drivers, both of whom were men that by their very nature of their occupations and [86]

work would observe more closely than the average layman would.

So that we have the point of collision fixed and the point of collision on the cars fixed.

The impact of this heavier fire truck was quite hard and it did throw the patrol car both to the west and the movement of the patrol car, moving at the speed it was, sent it considerably south.

Neither one was exceeding speed limits to any excess.

Both of them were emergency vehicles and their respective rights were equal if the activity at the moment brought them within certain immunities.

Now, that is the crux of this whole case.

I must conclude—while the evidence isn't very elaborate I think the stipulation should take us far enough so that we can conclude—that there was an understanding between the Governmental authorities of the City of Vancouver and the United States Army who had men stationed at Vancouver, each of whom maintained a fire fighting force and fire fighting equipment, that when either of them dispatched their equipment in response to a fire alarm, the other would immediately send equipment to the fire station—either at the Army or City—to stand by and take any call that might come in on another fire.

The question whether this would be an emergency to travel a distance as it was here, one-quarter of a mile, and be ready to answer a call is a question to determine here.

I think it is. I think it falls within the emer-

gency provisions and I shall briefly state why I feel that it does. [87]

The City of Vancouver, as every other municipality of that type and character, needed fire fighting equipment always standing ready and properly manned at every moment night or day. They didn't have, apparently, sufficient equipment to meet what might be their emergency needs. And, while the evidence is silent, however, I will have to assume at the moment that this run was being made from the Army fire station to the City fire station because the City equipment was out in response to a call, because the existing arrangement preceding this indicated that that was the only purpose of it.

The Army equipment was being driven by a soldier but it also carried two fire fighters who were likewise soldiers and the purpose is logical—that they were to do fire fighting if the need arose. It seems to me that this is highly important that, when it was possible that this Army fire truck reached the City fire station in the interim between the time that they were notified and it took them to go and arrive there, there might be another fire break out, and so it was important that they reach that place as quickly as possible.

The importance was recognized by the fact that the Army gave orders to its personnel in charge of this vehicle—and the personnel were required, of course, to obey these orders—that immediately upon leaving the Army station, on pulling out of the Reservation and on to Tenth Street, which was a substantial distance from the fire station—they

should commence to sound their siren and flash their red warning, and the testimony is that when one was on the other was on—that they work together in some combination. [88]

That was done.

True that Mr. Parke says he didn't hear it. There is no dispute at all from the evidence here that Army orders were being obeyed, that the siren was sounding for a distance of two or three blocks before they reached this intersection, and that the red warning lights on the vehicle indicated that it was making an emergency trip.

Neither of the vehicles, as I said, were going at any unusually high speed. They were going twenty-five (25) or thirty (30) miles an hour.

The patrol car was on an arterial and it was in the favored position with reference to traffic approaching from its left. The patrol car driver says he didn't hear and I shall find that he didn't hear, the siren and didn't see the red flashing light on the Army fire truck.

Had he looked, he probably would have seen it back a ways. The evidence is lacking entirely on whether he looked and I must assume he did not look, and I do find that the siren was being sounded at all times. That would bring this vehicle clearly within the exempt provisions of the statute.

Now these California cases: I have hastily glanced at them and they are generally a contest between an emergency vehicle and a private citizen, but not in all instances. So, to that extent, they would not be applicable. However, there is a case, just called to

my attention by my law clerk this morning, that is almost decisive of this situation. It is a case from the Ninth Circuit, and it was decided [89] probably twenty or thirty years ago. I haven't the date of it here. It involves an ordinance of the City of Seattle and the ordinance at that time had this provision:

"The following vehicles in the order named shall have the right of way in the use of all streets and public places as follows:

Apparatus of the fire department,

Police patrol wagons,

Ambulances responding to emergency calls,

Emergency repair wagons of the street railway companies . . ."

Here we had a fire truck answering a call. I can't remember the details of the case, but, at any rate, it was an action that was brought against the Puget Sound Electric Railway because they were a party to the collision. The Puget Sound Electric Railway was a foreign corporation. That is what gave the Federal Court jurisdiction. The case was tried before Judge Cushman, sitting in this Court, and it is reported in 253 Federal, page 710. Now, it was there held that the fire truck was immune and no liability. That decision was appealed. I have forgotten the name of the justice who wrote the decision, but this is a quotation from that decision:

"The question involved is one of construction. It is insisted that the [90] words 'responding to emergency calls' qualify the phrase 'apparatus of the fire department,' as well as

‘ambulances,’ and therefore that it is only when the apparatus of the fire department is responding to an emergency call that it is accorded the right of way under the ordinance.”

And, as I recall the facts in this case, this was fire apparatus returning from a call.

“On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call or making ready to meet the exigencies of another, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance.”

That language could be easily paraphrased and set directly into our situation here.

This Army fire apparatus presents even a stronger case than city fire apparatus returning to a station where they know [91] there is more equipment, because this run was being made with knowledge of the fact that there was no other fire fighting equipment at this station to answer emergency calls. They went to the City fire station just as the City equipment would if there were a fire on the Army post and the Army equipment was out. The City was obligated to dispatch equipment and an emergency could readily arise in the interim between the leaving of one station and arriving at the other.

So that, if we look for authority, I think this case

so squarely fits the situation here that it compels me to deny the relief sought, and likewise recovery of sixty dollars on Defendant's cross-complaint against the State will be denied because it is clear that there was that degree of negligence on the part of the Defendant that would bar any recovery. The failure to yield the right of way by the State Highway Patrol, under the circumstances, was the primary cause of this collision, and I shall have to so find.

This case has been a pleasant one to try since there has been no very sharp conflict in the testimony and I reiterate that the people who could be most depended where they were not inclined to be prejudiced, were the two drivers of the two emergency vehicles, and they both impressed the Court as being very high class persons.

Sometimes we are inclined to draw the impression that there is carelessness on the part of young men in the military service in the operation of vehicles, but in this case the Court had the privilege of seeing the young man, who at the time was in the military service and given the responsibility of operating that emergency vehicle, and [92] he gave every indication of being a highly dependable individual.

There is this thing about this case: It is largely marked by the "Nelson" feature. Counsel for the State, one of them, is a Mr. Nelson, and one of the State's witnesses was a man named Elmer Nelson, and the driver of the military vehicle is Clarence Nelson. That is just a comment in passing because it seems so unusual to the Court that out of seven

or eight people we should have so many with the same name. It is a highly honorable name.

On the facts I shall have to determine as I have indicated, and state to Counsel for the State that you will doubtless now examine this Federal case from this Court of Appeals. That does, in my judgment, cover this issue here and is decisive.

I do, as a matter of construction, find that under the facts as they existed here, and it was so recognized by the City of Vancouver and by the Army officials, that this trip from one station to another upon a call from either of them was an emergency. That being so, then this immunity attaches to the Army fire truck.

You may prepare findings and conclusions and submit them and I will allow exceptions to the State and to the Government.

You may want to take this case to the Circuit Court on the facts because we ruled adversely on the questions first raised and the Government, having a ruling against them, will have exceptions allowed, and I think your findings and judgment should recite that. That is on the statute of limitations and the issue of the right of subrogation. [93]

Mr. Dovell: And res adjudicata.

The Court: And res adjudicata. But the Court held against the Defendant on both of those—on all three of those—raised.

Do you intend to resist right of subrogation on the part of the State?

Mr. Dovell: I think, your Honor, that that has

since been settled. I think that that is settled and in that case——

The Court: It has never been settled as to a sovereign state, but it has been settled as to an insurance company, and, of course, every reason that could be advanced as to an insurance company would apply to the state.

Mr. Dovell: It looked to me like the State went into the insurance business in this instance.

The Court: Well, at any rate, each side will have exceptions to adverse rulings and you may prepare findings and judgment and decree.

Mr. Nelson: Thank you, your Honor.

The Court: Court will stand adjourned until two o'clock tomorrow afternoon.

(Whereupon, at 11:10 a.m., December 19, 1950, hearing in the within-entitled and numbered cause, was adjourned.) [94]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a full and complete, true and correct, transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed March 10, 1951.

In the United States District Court, Western
District of Washington, Southern Division

No. 1326

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of the
State of Washington,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, as amended, and Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers and pleadings in the above-entitled cause as are designated by the written Stipulation of the parties hereto, and the said papers and pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled cause filed and entered on January 9, 1951, to the United States Court of Appeals for the Ninth Circuit at

San Francisco, California, and are identified as follows:

1. Order Granting Leave to File Second Amended Complaint (filed Dec. 11, 1950) (19)
2. Second Amended Complaint (filed Dec. 11, 1950) (20)
3. Amended Answer and Cross-Complaint (filed Dec. 15, 1950)..... (22)
4. Reply to Amended Answer and Cross-Complaint (filed Dec. 18, 1950)..... (24)
5. Findings of Fact and Conclusions of Law (filed Jan. 4, 1951)..... (30)
6. Judgment (filed and entered Jan. 9, 1951) (28)
7. Memorandum of Costs and Disbursements (filed Jan. 9, 1951)..... (32)
8. Notice (Plaintiffs') of Appeal (filed Mar. 8, 1951)..... (34)
9. Cost Bond (of Plaintiffs') on Appeal (filed Mar. 8, 1951)..... (35)
10. Notice (Defendant) of Appeal (filed Mar. 8, 1951)..... (36)
11. Reporter's Transcript of Record (filed Mar. 10, 1951)..... (37)
12. Stipulation of Parties, with Approval of Court re filing of Defendant's Exhibit A-1 (filed Mar. 15, 1951)..... (38)
13. Stipulation Designating Parts of Record on Appeal (filed Mar. 22, 1951).... (41)
14. Statement (Plaintiffs') of Points (filed Mar. 22, 1951)..... (40)

15. Statement (Defendant) of Points (filed
Mar. 22, 1951)..... (39)

I do further certify that as part of the Record on Appeal I am transmitting herewith the following original exhibits admitted in evidence in the trial of the above-entitled cause, to wit:

Plaintiffs' Exhibits Nos. 1, 2 and 3, and

Defendant's Exhibit No. A-1 (attached to Stipulation above referred to and filed Mar. 15, 1951).

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit:

Notice of Appeal (Plaintiffs)..... \$5.00

Notice of Appeal (Defendant)..... \$5.00

and that said fee of \$5.00 due the Clerk by Plaintiffs is being paid by State of Washington warrant and the fee of \$5.00 of Defendant has not been paid for the reason that the appeal of Defendant is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 7th day of April, 1951.

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 12895. United States Court of Appeals for the Ninth Circuit. State of Washington, a Sovereign State, and Smith Troy, Attorney General of the State of Washington, Appellants, vs. United States of America, Appellee. United States of America, Appellant, vs. State of Washington, a Sovereign State, and Smith Troy, Attorney General of the State of Washington, Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Southern Division.

Filed April 9, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12895

STATE OF WASHINGTON, a Sovereign State,
and SMITH TROY, as Attorney General of
the State of Washington,
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellants.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD FOR
PRINTING

Come now appellants and pursuant to subdivision 6, rule 19 of the rules of the United States Court of Appeals for the Ninth Circuit, herewith adopt the statement of points filed by them in the district court upon which appellants intend to rely on appeal, and herewith designate the entire transcript of record as prepared and certified by the clerk of the district court, to be printed for purposes of this appeal.

Dated this 23rd day of April, 1951.

SMITH TROY,
Attorney General.

/s/ C. R. NELSON,
Assistant Attorney General.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT ON CROSS-
APPEAL AND DESIGNATION OF REC-
ORD FOR PRINTING

Comes now United States of America, appellee on the appeal of the State of Washington, and of Smith Troy, Attorney General thereof, and appellant on its own Cross-Appeal, and pursuant to subdivision 6, Rule 19 of the Rules of the United States Court of Appeals for the Ninth Circuit, herewith adopts the statement of points filed by it in the District Court upon which this appellant intends to rely in this court and cause; and with the foregoing statement, the said appellant designates as necessary for the consideration of said appeal and cross-appeal all that portion of the original papers of

record in this cause, and exhibits therewith certified and transmitted by the Clerk of the District Court to the United States Court of Appeals for the Ninth Circuit in this cause, pursuant to stipulation of parties covering omissions from record on appeal, with exception of documents therein named.

Dated this 24th day of April, 1951.

/s/ J. CHARLES DENNIS,
U. S. Attorney.

/s/ GUY A. B. DOVELL,
Asst. U. S. Attorney.

Attorneys for Appellee and Cross-Appellant, United
States of America.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 28, 1951.